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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1011

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ALABAMA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975
No. 75-

STATE OF ALABAMA ex rel. EUGENE SWEETON,
Chief of Police, City of Huntsville, Alabama

Petitioner,

vs.

GENERAL CORPORATION, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

The Petitioner, State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, respectfully prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court, entered on September 18, 1975 which reversed the Final Decree of Circuit Court Judge John D. Snodgrass, Madison County, Alabama entered on March 23, 1973, and remanded the cause for further proceedings not inconsistent with its opinion.

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OPINION BELOW

The opinion of the Alabama Supreme Court, filed on September 18, 1975, is reported in General Corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, 320 So.2d 668, and a copy thereof appears in the Appendix to this petition at pages D-3 through D-19. A copy of the final decree of Circuit Court Judge John D. Snodgrass, entered on February 23, 1973, and a copy of the amendment to said decree, entered on March 23, 1973 appears in said Appendix at pages B-3 through B-5 and C-3 through C-7.

JURISDICTION

The judgment of the Alabama Supreme Court was entered on September 18, 1975. A copy of such judgment appears herein at Appendix E-3. On December 16, 1975, Associate Justice Lewis F. Powell, Jr. entered an order extending the time in which to file a petition for writ of certiorari, in this cause, to and including January 16, 1976. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

QUESTION PRESENTED

Whether the padlock penalty of the Alabama Red Light Abatement Act, Title 7, section 1091

et seq., Code of Alabama 1940, Recompiled 1958,[1/]

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1. The Alabama Red Light Abatement Act had its genesis at a time in history when "lewdness" of a different type (but involving the same procedural problems) was plaguing society. See Columbia Law Review at 604, which traces in part the history of such legislation:

> " 'RED LIGHT' INJUNCTION AND ABATEMENT ACTS. -- The strong arm of equity has lately found increasing employment through the enactment in thirty-eight states of 'Red Light' Laws for the abatement of disorderly houses. Modelled upon the liquor laws which originated in Iowa, these laws owe their enactment to the inadequacy of criminal prosecutions;
> . . .
> The effectiveness of the legislation lies in stringent provisions for abatement and in penalties for contempt.
> "This is clearly police legislation, designed to protect the public health and morals rather than to provide a remedy for injury to private property. For instance, the injunction is made binding upon the defendants throughout the jurisdiction of the court and frequently throughout the entire state. Not only are the costs of the action made a lien upon the premises; but in many states a 'tax' or fine is levied when the final injunction is issued. . . "

Today, forty-one of the 50 states have a statute which employs the "Red Light Abatement" pattern of enforcement. These can be broken down into three broad categories: (1) a few states, like Missouri, use statutory language which is clearly limited to houses of prostitution and which could not be interpreted to include any form of obscenity (M.R.S. section 563.130);

(This footnote is continued on the next page)

authorizing closure of the premises for a period of up to one year, can be constitutionally applied to a motion picture theater which has been found

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(2) eight states have adopted amendments and statutory language which specifically includes places dealing with obscenity in the operation of the statute, (these states are: Delaware Article 10, Chapter 72 of the Delaware Code added in 1974 to include places dealing in obscene motion pictures and books; Indiana, Section 9-2711 of the Indiana Code, added in 1973 to include places dealing with lewd, indecent, lascivious or obscene films; Kansas, Article 39 K.S.A. section 22-3901, added in 1970 makes "promoting obscenity" a common nuisance and subject to the Red Light type abatement procedures; Louisiana, amended Title 13 L.R.S. of 1950, section 4711 to include maintainance of obscenity as defined by the penal laws in the definition of nuisance; Nebraska, enacted Legislative Bill 815 in 1974 which provides in Section 15 that a place dealing in obscene films is a nuisance; Ohio, the definition of nuisance in O.R.S. 3767.01 et seq., enacted in 1961, has served as a model for other state's expansion of their Red Light Abatement statutes; Tennessee, section 23-301 of the Tennessee Code Annotated, amended in 1973 to include a place dealing in obscene films as being within the definition of a place of lewdness; Texas, articles 4666 and 4667 of the Texas Penal Code, effective January 1, 1974 specifically provide for the enjoining of the use of a premises for purposes of "commercial obscenity"; (3) other states, like Alabama, California, and Michigan have used statutory language like "lewdness, assignation or prostitution" in which, by judicial decision, the term "lewdness" has been given a broad meaning.

to be a public nuisance by reason of its having engaged in a course of conduct of exhibiting obscene motion pictures, daily, for a continuous period of five weeks, during which period eight films were exhibited, all of which were held to be obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(1) First and Fourteenth Amendments to the United States Constitution.

(2) Alabama Red Light Abatement Act, Title 7, section 1091 et seq. Code of Alabama 1940, Recompiled 1958.

(3) Title 14, section 374(16j), Code of Alabama 1940, Recompiled 1958.

Copies of the above named provisions are set forth in Appendix F.

STATEMENT OF FACTS

A. The Bill of Complaint

A copy of the pleadings, entitled "Complaint and Application For Temporary and Permanent Injunction To Abate A Nuisance" appears herein at Appendix "A". The suit was filed on January 16, 1973 in the name of the State of Alabama by Eugene Sweeton, as a private citizen, pursuant to the provisions of the Code of Alabama 1940, Title 7,

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section 1093. Mr. Sweeton was and is the Chief of Police of the City of Huntsville. The bill of complaint (Tr. pp. 1-9) charged the Respondents with conducting a public nuisance by the exhibition of lewd and obscene motion picture films at the Fox Cinema Theatre in Huntsville. It was alleged that the Defendant General Corporation, the Respondent herein, was the operator of the business, and had operated said business for a period of time exceeding nineteen months before the filing of the bill of complaint; that the motion picture theatre had been open to, and soliciting, patrons from the general public; that the theatre was operated for profit; that the exhibition of the motion picture films referred to in the bill of complaint constituted a common law public nuisance, and a public nuisance as such term is defined in Section 1091 of Title 7 of the Code of Alabama 1940; that the exhibition of such films was in violation of the obscenity laws of the State; and that such obscene and lewd motion picture films were shown to the public so as to be offensive to public decency, morals, peace and health. The bill of complaint made specific reference, by name, to certain films which had been shown at Respondent's theatre from December 20, 1972, to January 9, 1973, inclusive, and also made reference to certain unnamed

features. Attached to the bill as exhibits were so-called "time and motion studies" of each of the films named in the bill, with the exception of films referred to in the paragraph numbered 12 of the bill as being entitled "Mermaids" and "Grabbers", which Respondent began exhibiting on or about January 10, 1973 (Tr. p. 4). The bill prayed for the issuance of a preliminary injunction, enjoining the Respondents from maintaining the alleged nuisance pendente lite, and closing the Fox Cinema against use by the Respondents as a motion picture theatre until decision upon the application for a permanent injunction, which was also prayed in the bill. The bill further prayed for an accounting of the box office receipts arising out of the exhibition of the motion picture films specifically referred to in the bill of complaint and prayed for an order that the Respondents appear with each of the films named in the bill and show cause why an injunction should not be issued and why an accounting should not be ordered of the box office receipts and forfeiture of the receipts to the State as contraband upon final determination of the cause. The bill further prayed that the Respondents be perpetually enjoined from exhibiting the motion picture films specified in the bill of complaint, and films of like or similar

kind of description, and that Respondents be enjoined permanently from maintaining the nuisance at the Fox Cinema and from maintaining such a nuisance elsewhere in the county. The bill further prayed judgment for costs of abating the nuisance, including attorney's fees and costs of investigating the charges made and in preparation of the case, and further prayed for general relief (Tr. p. 8).

B. Pre-Trial Procedure

Upon the filing of the bill of complaint on January 16, 1973, the trial court set a hearing on the application for a temporary injunction for January 26, 1973, and ordered the Respondents to produce at such hearing the motion picture film entitled "Mermaids" and the motion picture film entitled "Grabbers". The order was served upon General Corporation, through its agent, the manager of Fox Cinema, on January 16, 1973.

The Complainant, on January 16, 1973, further filed a motion with the trial court seeking an order directing Respondent to produce at the time and place set for a temporary injunction, and at the final hearing of the case, for use as evidence, the motion picture films entitled "Mermaid" and "Grabbers", which were then being shown at the Fox Cinema. The motion to produce

the films was set for a hearing by the trial judge on January 25, 1973, and a copy of the order setting the motion for hearing was served upon the Respondent on January 16, 1973 (Tr. p. 14). The hearing upon the motion to produce the films was duly continued, ex mero motu, from time to time, (Tr. p. 15, Tr. p. 16).

On February 13, 1973, Petitioner amended the original bill of complaint by naming and properly indentifying the Respondent "Mary Roe" as Jean Phillips, the manager of Fox Cinema (Tr. p. 18). The amendment also added paragraph 12 (A) to the original bill of complaint, which attached to the bill, as appendices, "time and motion studies" of the "Mermaids" and "Grabbers" films (Tr. p. 18).

On February 13, 1973, Respondents General Corporation and Jean Phillips filed a written motion to strike certain portions of the original bill of complaint, as amended (Tr. p. 22), and filed their answer to the bill (Tr. p. 23). Also on February 13, 1973, Respondents General Corporation and Jean Phillips filed a joint demurrer to the original bill of complaint, setting forth approximately twenty-eight grounds (Tr. pp. 24-28). The trial court, on February 13, 1973, entered a pre-trial order pursuant to Equity Rule 38 (Tr. pp. 28-29), outlining

the agreed issues of the case, and reflecting the stipulation of the parties that admission to the Fox Cinema was gained by patrons paying admission into an enclosed theatre; that the movie house was an "adult" movie house, and that no question was submitted to the court with regard to a determination of whether films were shown to minors; that, without the Respondents waiving their motions to strike or demurrers, the court would proceed with the viewing of the films alleged in the complaint and made the subject of the motion to produce; and that the other issues raised in the complaint, such as the accounting, attorneys' fees, and costs, were to be severed until a determination was made on the issuance of the preliminary injunction (Tr. p.29).

The trial court, on February 13, 1973, overruled the Respondent's motion to strike certain portions of the bill of complaint and overruled the Respondent's demurrer to the original bill (Tr. p. 30).

C. THE TRIAL

On February 15, 1973, the case came on to be heard before the court upon the application for a temporary injunction (Tr. p. 33).

The two motion picture films "Mermaids"

and "Grabbers" referrred to in paragraph 12 of the original bill of complaint, (Tr. p. 4, Tr. p. 18), were produced by Respondent General Corporation pursuant to subpoena duces tecum, motion to produce, and order of the trial court, and by agreement of the parties, the court viewed the two films on the premises of the Fox Theatre (Tr. p. 35).

Mr. Ron Curlee, a Detective for the Huntsville Police Department, was sworn and testified that during the period December 20 through December 26, 1972 he viewed a film entitled "The Making of the Blue Film " and another untitled "feature" at the Fox Cinema theatre (Tr. p. 36); that on December 27, 1973 he viewed the feature "Mary Jane" and a feature entitled "The Gun Runners"; that on January 4, 1973 he again viewed the film entitled "Mary Jane" and a feature entitled "I am Sandra"; and that on January 10, 1973 he viewed a film entitled "The Executive Wives" and a film entitled "The Mermaid". (Tr. p. 37). Mr. Curlee said that the feature "I am Sandra" had another title which was "The Making of a Woman". (Tr. p. 38). He paid an admission charge of three dollars (Tr. p. 38) and on each occasion that he viewed films at the Fox he was accompanied by Mr. Evans, another police officer (Tr. p. 38).

Mr. Curlee related in detail the substance of the film entitled "The Mermaid" (Tr. pp. 39-42). He stated that at the time of his visits to the theater he used a camera and made photographs of the films which he viewed (Tr. p. 42) using the following procedure:

> "I also had a tape recorder and the microphone of the tape recorder was plugged into the camera. Each time the camera clicked, it was recorded on the tape recorder. In other words, each time a frame was made, it was recorded on the tape recorder. The tape recorder was turned on at the beginning of the film, and at a later date you could take the tape recorder with a stop watch and turn the tape recorder on at the same time and start the stop watch, and each time you heard a click, record on a piece of paper the amount of time that it was into the recording."

He stated that thereafter he prepared exhibits and a "time-motion study", using the photographs which he took of "The Mermaid" (Tr. p. 43). The exhibits were marked as 4-A for the Plaintiff and the sound track of the tape recordings of the film were marked as Plaintiff's Exhibits 4-A-T(1) and 4-A-T(2) (Tr. p. 43). The labels on the Exhibits marked 4-A were prepared by Mr.

Curlee and record the serial number and the timed sequence of each scene in the film which the photographs depict (Tr. p. 43).

The same procedures were followed by Mr. Curlee in his viewings of the other films. Time and motion studies made by Mr. Curlee in like manner to those made by him in connection with the film "The Mermaid" were made in connection with each of the films referred to in the original bill of complaint and were offered into evidence. Mr. Curlee summarized in his testimony the content of each of the films referred to in the original bill, and the sound tracks of each of the films, which had been made by Mr. Curlee, were offered and accepted into evidence.

Mr. Curlee said that he attended the viewing of the film by the court at the Fox Theatre, and the film viewed by the court was the same which he viewed at the Fox Cinema during the week of January 10, 1973 (Tr. pp. 43-44).

By stipulation of the parties, copies of advertisements published in the Huntsville Times, a newspaper of general circulation in Madison County, advertising the theatre fare exhibited by the Fox Cinema for the period December 20, 1973 through January 10, 1973, were offered into evidence (Tr. pp. 85-86).

Mr. Charles O'Reilly, Jr., Advertising

Director of The Huntsville Times, was sworn and testified as a witness (Tr. p. 86). Mr. O'Reilly testified that the Huntsville Times billed Charles Outland and Respondent General Corporation, otherwise known as Southern Investment Theatre Group, for the advertising charges (Tr. pp. 88-89). Mr. O'Reilly said that the newspaper did not solicit the advertisements, which were placed by Respondent General Corporation, otherwise known as Southern Investment Theatre Group (Tr. pp. 90-91).

A photograph, which is marked as Plaintiff's Exhibit 10, depicting the Fox Cinema as it appears from the street on which it is situated, was offered and accepted into evidence (Tr. p. 93).

Respondent Jean Phillips was sworn as a witness for Complainant (Tr. p. 94) and testified that she had been manager of the Fox Cinema since January 13, 1973, and that she had been continuously employed by the Fox Cinema from January 1972 to the time of the hearing (Tr. pp. 94-95). Mrs. Phillips testified that during her tenure as manager of the Fox she had received her instructions in connection with the operation of the business from Floyd G. Bradford, of General Corporation, and Charles E. Outland, President of General Corporation, both of whom were

named as Defendants in the case (Tr. p. 98). She said that daily and weekly reports of the box office receipts were mailed by her, addressed to General Corporation, at 423 Broadway, Nashville, Tennessee (Tr. p. 99). Mrs. Phillips said that the local depository for the Fox Cinema receipts was an account in the Henderson National Bank of Huntsville, Alabama, and that the account was in the name of General Corporation (Tr. p. 100). Mrs. Phillips further testified that she had nothing to do with determining what films would be shown by the Fox Cinema and that she did not know exactly who did, but that she received booking slips from a firm known as Jaco Film Enterprises of Atlanta, Georgia (Tr. pp. 100-101). She said that the films were delivered to the Fox Cinema by a firm known as Theatre Services, which had a key to the building (Tr. p. 101). She said that the checks for the expenses of the theatre were drawn by General Corporation and were signed by the Defendants Outland and Bradford (Tr. p. 102).

The Respondent Theater did not put on any evidence.

On February 22, 1973, the trial court entered a supplemental pre-trial order (Tr. p. 121). The supplemental pre-trial order, among other things, reflected the stipulation of the parties

that the issues in controversy were:

(a) whether the conduct of the Respondents in showing film as alleged in the complaint in enclosed theatres, where admission is gained by adult patrons by paid admission, is sufficient to constitute lewdness as provided in Title 7, Section 1091 of the Code of Alabama, and

(b) "If the Respondents have conducted a public nuisance, the Petitioner and Respondents have agreed that the issues heretofore severed may be submitted to the court as a matter of law for the purpose of a final decree* * *."

The severed issues consisted of the question of (1) attorneys fees for the prosecution of the case, (2) whether the Petitioner, Sweeton, was entitled to his costs and expenses in preparation of the suit, and (3) whether the Complainant was entitled to an accounting of the box office receipts and forfeiture of same (Tr. pp. 121-122).

On February 22, 1973, Respondents General Corporation and Jean Phillips submitted the case for decree on the original bill, answer of Respondents, pre-trial orders, and the testimony, exhibits, and stipulations offered by Complainant at the oral hearing upon the application for a temporary injunction (Tr. p. 122). The Respondents,

General Corporation and Jean Phillips, submitted the case for final decree upon their answer to the original bill as amended, pre-trial orders, and the evidence taken orally before the court upon the hearing of Complainant's application for a temporary injunction (Tr. p. 123).

On February 23, 1973, the trial court entered its final decree (Tr. pp. 123-124), a copy of which appears herein at Appendix B. In its decree, the trial court found that the Defendant General Corporation was the operator of the Fox Cinema and that Respondents had shown obscene movies, as defined by Title 14, Section 374 (16) (j) et seq., of the Code, and as defined by Roth vs. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, "or by any other standard that this court is aware." The trial court further found that "obscene" means "lewd", and that "lewd" means "obscene". The trial court found that the Respondents had operated their theatre so as to constitute a public nuisance, and that "no intent was shown by the Respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theatres in any other manner". The decree perpetually enjoined the Respondents from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama, or elsewhere in Madison County, and

closed the theatre for any purpose for the period of one year "unless sooner released pursuant to Title 7, Section 1104, Code of Alabama 1940." The decree further directed sale of the personal property and contents used in conducting the nuisance, and directed that the proceeds of the sale of the personal property be applied in payment of the costs of the action and the costs of abatement (Tr. p. 124).

Pursuant to the terms of the final decree, and in conformity with it, a permanent writ of injunction was issued against the Defendants General Corporation and Jean Phillips on February 24, 1973 (Tr. pp. 128-129), which embodied the terms of the Court's final decree.

On March 2, 1973 a claim was made for some equipment (Transcript, p. 129).

On March 23, 1973, on motion of the Complainant, the trial court filed an amendment to the final decree, a copy of which appears herein at Appendix "C". The amendment, in effect, rewrote the decree (Tr. pp. 130-132), and specifically limited the operation of the permanent injunction to forms of speech or expression which would be "obscene", as defined by controlling decisions of the Supreme Court of the United States, or by the Supreme Court of Alabama, "whichever definition shall be less

restrictive." (Tr. p. 131).

Coca Cola Company filed on April 10, 1973 for certain personal property (Tr. p. 137). On April 17, 1973, Coca Cola Company was allowed to reclaim its personal property (Tr. p. 139).

An Appeal was duly taken to the Alabama Supreme Court (Tr. p. 139), and a cost bond was filed by Defendant General Corporation on August 23, 1973.

On September 18, 1975, the Alabama Supreme Court handed down its decision upholding the contentions of the petitioner herein on all of the trial issues (including those involving statutory construction) with one exception---that regarding the Respondent's federal constitutional claim that the "padlock" penalty of the Alabama Red Light Abatement Act was a "prior restraint" on free speech. More specifically, the Court held in favor of the petitioner on the following issues:

(1) The definitional infirmities in the Alabama Red Light Abatement Act were cured by the trial judge's incorporation of the Roth standard for obscenity (Title 14, section 374 (16j)) into the Red Light Abatement Act, and the judicial construction given by the Alabama Supreme Court to that statutory definition in Pierce v. State, 292 Ala. 473, 296 So.2d 218

(May 9, 1974).

(2) Since the broad language of the Red Light Abatement Act gave no indication as to the legislative intent to either include or exclude its application to obscene material, the prior construction given to that statute (i.e., that it was declaratory of the common law) was controlling, and such public exhibition of obscenity came within its ambit, since acts at common law which were contrary to public morals were considered to be public nuisances and subject to abatement as such.

(3) The burden of proof required by the statute is upon the people, and does not shift and, in the cause herein, the people did in fact meet their burden.

(4) The requirement of a prompt judicial review of any administrative or executive suppression was met. The Act does not allow, nor was there, in fact, any suppression of the Respondent's activities until after a final adjudication on the issue of obscenity.

(5) The allowance of the issuance of a preliminary injunction after the filing of the complaint was not an infirmity, since a hearing must be had thereon within 10 days, and the defendant must be given at least five days notice prior to such hearing. Further, under section

1103 of the statute, a final adjudication on the ultimate issue of obscenity takes precedence over all other cases, except injunctions.

(6) There was ample evidence for the trial judge to conclude that the motion pictures in question were obscene.

At the same time, however, the Court ruled that even where, as in this case, there was ample evidence for the trial judge to conclude that the motion pictures in question were obscene, and that the theater was guilty of maintaining an obscenity nuisance, nevertheless, the "padlock" penalty could not be applied, because to padlock the theater's operations for one year would constitute a prior restraint, in violation of the federal constitution.

REASONS FOR GRANTING THE WRIT

The Federal Question Is Substantial

In past Terms, the public nuisance approach to this nation's obscenity problems has been before this Court in a number of cases:

1972 October Term

(1) Grove Press Inc. v. Flask, ("I Am Curious (Yellow)"), 326 F.Supp. 574, (Mar. 10, 1970) vacated and remanded in Grove Press Inc. v.

Flask, (70-1) 413 U.S. 902, 37 L.Ed.2d 1013, 93 S.Ct. 3026 (June 25, 1973).

(2) A Motion Picture Film Entitled "Vixen" v. Ohio ex rel Keating, ("Vixen") 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded in A Motion Picture Film Entitled "Vixen" v. Ohio ex rel. Keating, (71-599), 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973).

(3) Gulf States Theatres of Louisiana Inc. v. Louisiana ("The Stewardesses"), 264 La. 44, 270 So.2d 547 (Dec. 18, 1972), [2/] vacated and remanded in Gulf States Theatres of Louisiana

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2. The uncertainty which is developing as a result of this Court's inaction in this area is pointed up by the final result reached in Gulf States Theatres of Louisiana, Inc. v. Louisiana, supra. In its original opinion in 270 So.2d 547, the Louisiana Supreme Court had upheld the Louisiana Red Light Abatement Act, its application to the film "The Stewardesses", and the "padlock" penalty. When this Court remanded all of the obscenity cases, following its ruling on June 21, 1973 in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, a change of membership had taken place on the Louisiana Supreme Court and the new majority of that court, upon remand, declared both the Louisiana obscenity laws and the Red Light Abatement Act's obscenity application to be invalid. A major authority in support of the public nuisance concept suddenly became a major authority against its application. See 287 So.2d 496, supra, (Dec. 3, 1973).

Inc. v. Louisiana (72-1221), 413 U.S. 913, 37 L.Ed.2d 1036, 93 S.Ct. 3063 (June 25, 1973).

(4) Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio, et al. v. U.S. District Court for the Northern District of Ohio, Western Division, et al. (motion picture theater course of conduct--16 films in a two month period), (No. 72-1613), Application for stay or writ of injunction denied in 413 U.S. 918, 37 L.Ed.2d 1039, 93 S.Ct. 3068 (June 25, 1973).

1973 October Term

(1) Speight T/A Harem Book Store v. Slaton (Book store), 356 F.Supp 1101 (Feb. 22, 1973). Probable jurisdiction noted in Speight et al. T/A Harem Book Store v. Slaton etc., et al., (No. 72-1557) 414 U.S. 815, 38 L.Ed.2d 48, 94 S.Ct. 129 (Oct. 9, 1973), vacated and remanded in Speight T/A Harem Book Store et al. v. Slaton etc., et al., (No. 72-1557) 415 U.S. 333, 39 L.Ed.2d 367, 94 S.Ct. 1098 (Feb. 27, 1974).

(2) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater course of conduct -- 16 films in a two month period) (No. 73-296). Probable jurisdiction noted and set for oral argument in tandem with No. 73-1119 in 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(3) MTM, Inc. et al. v. William J. Baxley etc., et al. (Motion picture theater course of conduct) (No. 73-1119). Probable jurisdiction noted and set for oral argument in tandum with No. 73-296 in 415 U.S. 975, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974).

(4) Louisiana et al. v. Gulf States Theatres of La., Inc. et al. ("The Stewardesses") 287 So.2d 496 (Dec. 3, 1973), petition for writ of certiorari denied in Louisiana et al. v. Gulf States Theatres of Louisiana, Inc., et al., (No. 73-1458) 417 U.S. 911, 41 L.Ed.2d 215, 94 S.Ct. 2610 (May 28, 1974).

1974 October Term

(1) Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd. (Motion picture theater course of conduct -- 16 films in a two month period) (No. 73-296), vacated and remanded in Lawrence S. Huffman, as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd, ___ U.S. ___, 43 L.Ed.2d 482, ___ S.Ct. ___ (Mar. 18, 1975).

(2) MTM, Inc., et al. v. Baxley, etc. et al. (Motion Picture Theater course of conduct (No. 73-1119), vacated and remanded in MTM, Inc., et al., v. Baxley, etc., et al., ___ U.S. ___, 43 L.Ed.2d 636, 95 S.Ct. ___ (Mar. 25, 1975).

(3) Art Theater Guild Inc., et al. v. Ohio ex rel. Ewing ("Without A Stitch") 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974), appeal dismissed for want of a substantial federal question in Art Theater Guild Inc., et al., v. Ohio ex rel. Ewing (No. 73-1973) ___ U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___ (April 21, 1975).

(4) Marks et al. v. Leis (Book store) (unreported), vacated and remanded in Marks et al. v. Leis (No. 74-793) ___ U.S. ___, 44 L.Ed.2d 96, ___ S.Ct. ___ (April 28, 1975).

(5) Art Theater Guild, Inc. et al., v. Ohio ex rel. Schoen ("The Stewardesses" and "History of a Blue Movie")(unreported), appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc. et al. v. Ohio ex rel. Schoen (No. 74-955) ___ U.S. ___, 44 L.Ed.2d 445, ___ S.Ct. ___ (May 12, 1975).

(6) Art Theater Guild, Inc. et al. v. Ohio ex rel. Robert J. Anderson ("Deep Throat")(unreported) appeal dismissed for failure to file a timely notice of appeal in Art Theater Guild, Inc., et al. v. Ohio ex rel. Robert J. Anderson (No. 74-956) ___ U.S. ___, 44 L.Ed.2d 445, ___ S.Ct. ___ (May 12, 1975).

1975 October Term

(1) Nihiser v. Sendak, No. 73 F. 93 ("Deep Throat") (N.D. Ind. Nov. 14, 1974) (No. 74-1165)

vacated and remanded in Sendak, etc., v. Nihiser, dba Movieland Drive-In Theater, ___ U.S. ___ S.Ct. ___ (Nov. 17, 1975).

A review of the files in the above appeals will demonstrate that, in none of these cases, has the critical "padlock" issue of the Red Light Abatement Act been drawn as clearly in focus. With the single exception of the constitutional issue as to whether the "padlock" penalty constitutes a "prior restraint" in violation of the First Amendment, the decision of the Alabama Supreme Court below upheld the petitioner's claims on all of the trial issues involving the Red Light Abatement Act, including those State issues involving statutory construction.

The merits of the public nuisance approach, and the critical question as to whether or not the "padlock" penalty of the Red Light Abatement Act is in derogation of federal rights, are "burning" issues in a number of other states. See Busch et al. v. Projection Room Theater et al., 118 Cal.Rptr. 428 (Dec. 27, 1974), hearing granted on March 10, 1975 in L.A. No. 30518 and argued to the California Supreme Court on June 18, 1975; State of Michigan ex rel. Cahalan v. Diversified Theatrical et al., 229 N.W. 2d 389 (Mar. 4, 1975) hearing granted and argued in the Michigan Supreme Court in

November 1975; Oklahoma v. Stephen Hess dba Venus Book Mart et al., ___ Okla. ___, ___ P.2d ___ (Sept. 16, 1975); Commonwealth of Pennsylvania v. McDonald, ___ Pennsylvania ___, ___ A.2d ___ (Oct. 30, 1975); Universal Amusements Co., Inc. et al. v. Carol Vance et al., In the U.S. District Court for the Southern District of Texas, Houston Division, ___ F.Supp. ___ (20 consolidated cases) (October, 1975). A timely decision by the Court on the critical issue in this case will obviate a great deal of additional litigation on the same issue in other state and federal courts.

II

AS APPLIED TO THE FACTS HEREIN, THE ALABAMA RED LIGHT ABATEMENT ACT INVOLVES NOTHING MORE THAN A REAL PROPERTY INTEREST AND THE APPLICATION OF A STATUTORY PENALTY. IT DOES NOT PRESENT A FIRST AMENDMENT QUESTION.

From the earliest days of Anglo-Saxon law, a moral nuisance has been abatable as a public nuisance. See "The Law of Nuisances" by H.G. Wood at sections 23 and 24, "Acts affecting public morals, public nuisances per se." Joyce, in his treatise on the Law of Nuisance, points out that, under the common law, the municipal corporation not only has the right, but it also

has the obligation to remove the moral nuisance and, in this regard, this Court has stated in Phalen v. The Commonwealth of Virginia, 12 L.Ed. 1030, 1033 (1850) that "It is a principle of the common law, that the king cannot sanction a nuisance. . ." See also Rex v. Curl, 2 Strange 789 (1727) and Sir Charles Sedley's case 1 Sid 168.

The "padlock" power being exercised by law enforcement in the Alabama Red Light Abatement Act is one of the most basic powers of local government--the power in aid of its duty to protect the public morals of the local community against public conduct which "government" regards as malum in se. The Alabama Legislature has determined that the "padlock" power should be applied where "public lewdness" has been established as a regular course of conduct. To frustrate that legislative determination would constitute an unconstitutional abridgment of fundamental rights under the federal constitution. Mugler v. Kansas, 123 U.S. 205 at 210 (Dec. 5, 1887).

The record clearly establishes the existence of a moral nuisance. One need only casually examine the time-motion studies of the eight films which were pleaded by incorporation as Appendices 1A, 1B, 2A, 2B, 2C, 3A, 3B, 4A and

4B to the Complaint, (See Appendix A-8 herein), or examine the specific pleadings on "lewdness" at paragraph 15(c) therein. (See Appendix A herein, at pages A-11 through A-13. Petitioner's cause of action does not arbitrarily refer to isolated circumstances but, on the contrary, describes a continuing course of conduct which involves weekly "film selection". Paragraph 9 alleges that "for a period of time in excess of 19 months, the Respondents, through the Fox Cinema Theater, have consistently shown lewd and obscene motion picture films in the City of Huntsville, County of Madison, which films have violated the laws of the State of Alabama . . ." In support of that general allegation, the pleading thereafter sets forth, in paragraphs 10(a), 10(b), 10(c) and 12, a continuous course of conduct extending from December 20 through December 26, December 27 through January 2, January 3 through January 9, and January 10th and thereafter (see Appendix A herein, at pages A-7 and A-8).

On this appeal, Petitioner emphasizes that, in the face of this record, the respondent offered no evidence, whatsoever, to rebut the petitioner's proof which was admitted in evidence in support of the complaint. What emerges from the Alabama Supreme Court's ruling in this case

is a broad rule of law that, under no circumstances, may the "padlock" penalty be applied when "lewdness" is presented to the public in filmed portrayals! The fallacy of that reasoning is clearly and logically explained in the opinion of Associate Justice Burke, speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents, 248 N.Y.S.2d 857, (Mar. 26, 1964). To so hold, would be an infringement upon the legislative powers of government, regarding public nuisances, stated above.

The essence of the Alabama Supreme Court's erroneous ruling is its conclusion that, even though a public nuisance had been found to exist at the theater, based upon a daily course of conduct extending over a period of five weeks and involving the exhibition of a multitude of obscene motion picture films, still the state court could not apply a statutory one year padlock penalty against the property because such penalty would also operate against the theater operator personally and, in thus preventing him from showing films at that location in the future, which might be constitutionally protected, would constitute an unconstitutional prior restraint. By thus riveting its attention to the prior restraint "in personam" implications

of Near v. Minnesota, 283 U.S. 697, 75 L.Ed. 1357, 50 S.Ct. 625, the Court lost sight of the fact that the Alabama Legislature had undertaken in the Red Light Abatement Statute to provide what, unquestionably, is an "in rem" and not an "in personam" remedy. It should be noted, in this regard, that in other parts of its opinion, the Court took note of the special function of the nuisance action. See General Corporation v. State ex rel. Sweeton, 320 So.2d 668 at 673 where the Court noted, in considering the burden of proof issue:

> . . .there is a dichotomy in the social ills against which obscenity law and public nuisance law are directed. The definitional test for obscenity attempts to separate those materials protected by the guaranties of freedom of expression; the aim of a nuisance action, on the other hand, is not the suppression of a particular form of expression, rather the abatement of a condition which works harm upon a substantial number of the public or which injuriously affect public safety, health, or morals. City of Selma v. Jones, 202 Ala. 82, 79 So. 476 (1918). (Our emphasis.)

The "in personam" provision, which troubled the Alabama court is not an essential part of the statutory scheme and should have been disregarded by that Court under the paramount rule of statutory construction which requires a Court to ascertain and, where possible, give effect

to the intent and purpose of the legislature, as expressed in the statute. 82 C.J.S. Statutes, page 560.

The erroneous conclusion which was reached by the Alabama Supreme Court can be isolated by examining the contrary conclusion which must be reached, when an attack is made upon the same moral nuisance from a less powerful source; namely, the power which resides in a landlord, incident to his ownership of the land upon which the moral nuisance is located. A case involving this general principal was recently reported as a news item in the Hackensack, New Jersey Record in October of 1975. In that case, Arnd Bollhardt and Stuart Shaw, partners in Reality Alliance, Inc., which leased premises from Fazio for an adult bookstore, were evicted by Landlord Fazio in a civil lawsuit in ejectment, brought by landlord Fazio for their having violated the terms of the lease (see Hackensack, N.J. Record of October 15, 1975). Upon District Court Judge Gerald E. Monaghan's ruling on September 16, 1975 that the store's sexual materials violated state obscenity laws, a judgment was entered voiding the lease and ejecting the tenants. After the trial, State Supreme Court Justice Morris Pashman granted an emergency stay which permitted the store to stay open pending an

appeal. On October 14, 1975, the New Jersey Supreme Court, by a vote of 5-2, lifted the stay, requiring the bookstore to close while its appeal was pending (Hackensack, N.J. Record of October 16, 1975). If closure can thus be accomplished through application of "Hornbook Law" legal principles relating to the Landlord-Tenant relationship, what justification can be found for arriving at a different result, where an attempt is made to employ municipal powers relating to the civil abatement of public nuisances?

Petitioner submits that the proper construction of the "padlock" provision of the Alabama Public Nuisance Abatement Act is the rationale expressed by the three judge U.S. Federal District Court for the Southern District of Ohio, Western Division, in a case involving a book store, in Cincinnati Properties Inc. et al. v. Leis et al., (unreported) (May 2, 1974), judgment vacated and remanded on other grounds in Marks v. Leis, ___ U.S. ___, 44 L.Ed.2d 96, ___ S.Ct. ___ (April 28, 1975), and by a majority of the Court of Appeal, Fourth District, Second Division, in a case involving "entertainment" in People ex rel. Hicks v. "Sarong Gals", 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (Oct. 18, 1974) hearing denied by the California Supreme Court on December 11, 1974.

A. The Rationale Employed in Cincinnati Properties Inc., et al. v. Leis et al.

In the Cincinnati Properties, Inc. case, supra, the Court was faced with the identical issue, except that there the three judge Federal Court was considering an application of the "padlock" provisions of the Ohio Public Nuisance Statute, (O.R.C. sections 3767.01 et seq.) to an adult book store. In upholding the "padlock" provision, that Court stated:

> "The plaintiffs' constitutional argument is this: A person is operating a book store containing a thousand different items each concedely presumptively protected by the First Amendment - a fair sampling of the 1,000 produces 50 which are subsequently the subject of an adversary judicial proceeding and found to be obscene. Any state remedy applied to the facts which prevents the operator from staying in business at that location and selling the other non-judicially examined materials is a prior restraint on the sale of those materials and therefore violates the First Amendment. We do not agree. The argument overlooks the right of the State, within constitutional bounds, to declare or define public nuisances and abate them. A state may,

of course, in the exercise of its police powers, prohibit certain conduct. It is not questioned - whatever the difficulties of ascertainment - that the states have power to prohibit obscenity and, within the Miller limits, to determine what is and is not. Kingsley v. Brown, 354 U.S. 436 (1967); United States v. Reidel, 402 U.S. 351 (1971); Miller v. California, 413 U.S. 15 (1973); Paris v. Slaton, 413 U.S. 49 (1973). Nor is it questioned that a state, having judicially determined that a given product is obscene, may validly enjoin the sale of that product by an individual, provide for its destruction and/or provide criminal sanction. The fallacy of the plaintiffs' position is somewhat indicated by this simple example: A person possessing for sale one copy of one book concedely obscene and ten copies of a concedely non-obscene book is imprisoned for the former- during the term of imprisonment he is effectively stopped from dealing in non-obscene materials. Surely, it would not follow that the imprisonment was unconstitutional because it was a prior restraint respecting the innocent materials."

"From time immemorial states have

chosen, in the exercise of their police power, to define certain action as illegal and, in addition, to define the place where certain prohibited activity is carried on as a "nuisance". The attendant remedy provided in such nuisance cases has been one against the place in which the activity has been carried on. This record is clear that the business of selling books and materials and offering shows was being carried on in the involved locations (see, for instance, the hundreds of publications contained in the "Inventory" involved in No. 8714 (copy of the state court record attached to defendant Conroy's motion for summary judgment). No one questions that the sampling was a fair one and that sampling produced what is 100%, on this record, illegal and unprotected obscenity."

"The State of Ohio has seen fit to define as a nuisance, subject to abatement, a place in which obscenity is conducted. There being no question of fact that a business of obscenity was carried on, the question in this case is, therefore, really whether the State may validly define the operation in the place as a nuisance and close it for a year - padlock it - on that

basis. If it can, there is no prior restraint of the non-judicially-viewed material, except purely incidental. As Mr. Justice Frankfurter said in Kingsley, at page 441, "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties:

'What is needed', writes Professor Paul A. Freund, 'is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis.' "

"The constitutional power of the State to abate what has been appropriately defined as a public 'nuisance' has never been seriously questioned. 'Padlock' remedies have been consistently provided for by most states in the areas of prostitution, gambling, and liquor violations. It is not for us to conclude that one or the other of these subjects vis-a-vis the

State's padlock power should be classed differently than obscenity. Each is a proper object of the police power and not unrelated. To quote again from Kingsley, at page 441, the Supreme Court, speaking in the area of dissemination of pornography, said:

> 'It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. (underscoring ours.) Whether proscribed conduct is to be visited by a criminal prosecution or by a qui tam action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice.'

"Mugler v. Kansas, 123 U.S. 623 (1887) involved Kansas' first prohibition laws and, among others, a section providing, 'All places where intoxicating liquors are . . .sold. . . .are declared to be common nuisances and upon the judgment of any court . . . .finding such place to be a nuisance under this section, the sheriff . . . shall be directed to shut up and abate such place. . . .' The place involved had been the subject of liquor sales. The Court, in upholding the constitutionality,

said:

> 'The State, having authority to prohibit the. . .sale of intoxicating liquors. . .we do not doubt her power to declare any place kept and maintained for the illegal manufacture and sale of such, shall be deemed a common nuisance and to be abated, and, at the same time, to provide for the indictment and trial of the offender. One is a proceeding against the property used for forbidden purposes. . . . The statute does not put the brand of a common nuisance upon any place, unless that place is kept and maintained for purposes declared by the legislature to be injurious to the community.' (underscoring ours.)
>
> "The padlocking provision of the Ohio statute is a time honored remedy involving the place--it is not censorship or prior restraint."

B. The Rationale Employed in People of the State of California ex rel. Hicks v. "Sarong Gals".

In People of the State of California ex rel. Hicks v. "Sarong Gals", supra, the Court

of Appeal, Fourth Appellate District, was construing an application of the California Red Light Abatement Statute. There, the trial court permanently injoined certain parties from "maintaining, using or occupying the premises known as "Sarong Gals" for the purpose of "lewdness" and had closed the premises to all use for one year. In affirming the permanent injunction, the Court of Appeal analyzed the "padlock" provision as follows:

> "Appellants finally contend that the abatement order is overbroad and impinges upon their First Amendment right to present nonlewd dancing exhibitions at the Sarong Gals. Of course, just as a court order for the incarceration of a convicted lawbreaker impinges on all sorts of constitutional rights, so does the abatement order. The order shutting down the property except for limited uses is specifically authorized, however, by Penal Code, section 11230 which permits the 'closing of the (offending) building. . .against its use for any purpose. . .for a period of one year,. . . .' The question is, therefore, not whether the order impinges on constitutionally guaranteed rights, but whether the statute constitutes a permissible exercise of the

state's police power. (Cf. Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal.2d 515, 530.)

"The purpose of Red Light Abatement proceedings is to abate a nuisance. Abatement of nuisances is a long established and well recognized exercise of the state's police power. (Board of Supervisors v. Simpson, 36 Cal.2d 671, 675; People v. Casa Co., 33 Cal.App. 194; People v. Barbiere, 33 Cal.App. 770, 775-776.) The provision in Penal Code, section 11230 authorizing closing of the offending property to all uses for a period of one year, while harsh, is constitutionally permissible. The Legislature could, and presumably did, consider the alternative of constant police surveillance of the offending premises too burdensome to the community. It is to be remembered that Red Light Abatement proceedings are directed against the offending property itself. Their purpose, it has been said, 'is to effect a reformation in the property itself.' (People v. Bayside Land Co., supra, 48 Cal.App. at p. 261.) Thus, while appellants are arguable denied their right of First Amendment expression to some extent, they are denied such right only upon the

> specific property here involved and only for a limited period of time. They are in the meantime free to exercise their First Amendment rights at any other place. Moreover, appellants' restricted First Amendment rights are penumbral at best. The right to present non-lewd dancing for commercial purposes in a beer bar is hardly to be equated with the right to hold a town hall meeting (See Crownover v. Musick, supra, 9 Cal.3d at page 424-426.) Thus, the interference with appellants' right to free expression is limited and easily overbalanced by the state's substantial interest in abating public nuisances.

The rationale of the Alabama Supreme Court stands in marked contrast to that employed by the Ohio Supreme Court in interpreting the Ohio Red Light Abatement Statute. See, also, Michigan ex rel. Cahalan v. Diversified Theatrical Corp., 229 N.W.2d 389 at 395 (Mar. 4, 1975). In Ohio, where the statutory language defining "nuisance" in the Ohio Red Light Abatement Statute specifically encompasses a place where obscene films are exhibited, the operation of the statute, in general, is quite simple. Its constitutionality as applied to one motion picture film ("I Am Curious Yellow") was challenged in the federal

system and upheld by a three-judge court in Grove Press, Inc. v. Flask, 326 F. Supp 574 (Mar. 10, 1970) (Celebrezze, Green, Batiste). See Grove Press Inc. v. Flask, 413 U.S. 902, 37 L.Ed.2d 1013, 93 S. Ct. 3026 (June 25, 1973) vacated and remanded for further reconsideration in light of Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 207 (June 21, 1973.) In State of Ohio ex rel. Ewing v. "Without a Stitch", 37 Ohio St.2d 95, 307 N.E.2d 911 (Feb. 27, 1974) the Ohio Supreme Court also upheld its constitutionality. There the State Court discussed, at great length, the operation of the Statute as a whole, as applied to the motion picture film, "Without A Stitch" and concluded at page 917:

> "It is interesting to note that six of those reasons were also raised and rejected by the Federal District Court in Grove Press v. Flask, supra, (326 F.Supp. 574).
>
> "This court holds that R.C. 3767.01 et seq. prescribe a constitutionally permissible method of controlling the exhibition of obscene films."

The Ohio Supreme Court in applying the "padlock" provision in State of Ohio ex rel. Ewing v. "Without A Stitch", 37 Ohio St.2d 95, 307 N.E.2d. 911, 917 (Feb. 24, 1974) surmounted the

obstacle envisioned by the Alabama Supreme Court by simply holding the obvious--that the release provisions do not require the owner to show that no film to be exhibited during the one-year period will be obscene---the operator is simply required to demonstrate that the nuisance, in what ever form, has been abated. On appeal, this Court dismissed the appeal for want of a substantial federal question. See Art Theater Guild, Inc. v. Ohio ex rel. Ewing, ___ U.S. ___, 44 L.Ed.2d 82, ___ S.Ct. ___ (April 21, 1975).

Under the Ohio and Alabama Statutes, after an adverse decision in the trial court and the preliminary injunction is issued, the losing litigant has an option as operator and "the person owning in control, or in charge of the nuisance so enjoined." He can show "to the satisfaction of the court or judge that the nuisance complained of is abated," in which case, the court is not required to close the place against its use for the "lewdness" which had been found to exist. Under the Statute, the theater cannot be shut down unless the trial judge is convinced from evidence that the public nuisance is continuing and presently exists. If for example, the public nuisance is found to exist solely on the basis of a film, such as "I Am Curious (Yellow)", and such showing is not representative

of the course of conduct normally experienced, then it could not reasonably be said that a public nuisance exists if, at the time of the trial judge's finding and the preliminary injunction, the film is not showing, having been "pulled" by a responsible exhibitor.

By admitting that under the above set of circumstances such a ruling is proper under the statute, it does not follow therefrom that such would be proper in all cases. The clear intent of the statute is otherwise. Where, for example, the proof were, as here, that the operator has exhibited hard-core programs over a long period of time, the trial judge would be warranted in refusing to accept the testimonial evidence offered by such operator as meeting his burden of proof, i.e., "to the satisfaction of the court that the nuisance had been abated." The trial judge could properly conclude that to accept such testimony, under the proof offered, would be to perpetuate a fraud on the court. See People of the State of California ex rel. Hicks v. Sarong Gals, supra, where the Court, in discussing a related problem, noted that once the public nuisance had been established, the burden of presenting evidence that the public nuisance had been abated shifted to the defendant:

"Appellants next contend that the order

of abatement was invalid because the nuisance had been abated. In support of their contention, they argue that no evidence was presented to establish violations of lewd conduct or obscenity statutes after December 15, 1970. The contention is without merit."

"In the first place, evidence was introduced at the trial reporting a performance at the Sarong Gals on or about January 3, 1973, less than two weeks before the trial date, from which the trial court could conclude that the nuisance was continuing."

"In the second place, once the People presented evidence to show that lewd acts had taken place at the Sarong Gals, it was incumbent upon appellants to present evidence showing that the nuisance had been abated. (See People v. Goddard, 47 Cal.App. 730, 734; People v. Macy, 43 Cal.App. 479, 483; People v. Dillman, 37 Cal.App.415, 419-420.) It is a maxim of jurisprudence that '(a) thing continues to exist as long as is usual with things of that nature.' (Civ. Code, 3547).) Appellants' reliance on People v. Goddard, supra, is misplaced. In Goddard, there was clear and uncontra-

dicted evidence to show that the persons occupying the premises for immoral purposes vacated the premises three days before the filing of the complaint. No similar showing was made here."

C. The Error In Logic Of The Alabama Supreme Court's Analysis Of the "Padlock" Provisions of the Alabama Public Nuisance Abatement Statute.

Petitioner herein submits that, analytically, the Alabama Supreme Court's error in logic is the result of faulty deductive reasoning, which proceeded somewhat as follows:

Major Premise: To enjoin the showing of films in the future without a prior adversary hearing on the obscenity of such films is a prior restraint and unconstitutional under Near v. Minnesota, supra.

Minor Premise: The padlock penalty of the Alabama Public Nuisance Act operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films.

Conclusion: The Alabama Public Nuisance Statute is unconstitutional.

The syllogism formed by the above three propositions is inaccurate for the facts in the minor premise have been used falsely, not having been given in their actual setting of experience,

but abstractly from a larger whole of circumstances. See Legal Reasoning and Briefing, by Brumbaugh, copyright 1917 by the Bobbs-Merrill Co. at page 56:

> "The situation is different if the answer or plea be one in confession and avoidance. Logically considered, the admission or confession is not that the two premises are legally connected, but merely on the face logically correct. They are admitted to be, parts only, of a larger whole of circumstances which the complaint has not adequately set out, and hence is an instance of where legal logic varies from ordinary logic. The latter concerns itself merely with the correct relationship of particulars and rules, but law looks into the actual background of fact. We have seen elsewhere that legal logic defines its own concepts, and prescribes the number, condition, and nature of its facts - now we preceive that it demands also that all of such facts be correctly reported. Certain facts, therefore, in a pleading may be confessed as true, but at the same time not true for the purpose and effect for which they were originally drawn up, that is to say, their legal effect as the Minor

Premise of a legal syllogism is false, because the facts have been used falsely, not having been given in their actual setting of experience, but abstracted from a larger whole of circumstances. Thus, a part removed from the whole of which it is a part no longer appears in its true significance, and it is this falsity of a want of completeness against which an answer Confession and Avoidance is directed.

"The effect of an answer in Confession and Avoidance, from the syllogistic side, is to eliminate the general rule of law as inapplicable to the actual and complete set of facts, and by means of the new matter which is added, completely change the coloring of the Minor Premise, so that it no longer expresses any cause of action against the defendant, or one of a different import and effect. In such manner the whole legal syllogism, as first set up by the complaint, vanishes. However, it does not follow that a trial will be made unnecessary, for the new matter alleged in the answer may in turn be denied, and this issue of fact will then be tried upon its merits. In such case the validity of the primary syllogism is held in abeyance until the latter question

upon which it is now conditioned is determined. If the new matter is relevant and proved true, the whole original cause of action will disappear, or be modified, but if not, then the two premises alleged in the first pleading will become legally effective without further proof.

"In addition to pleadings by way of denial or confession and avoidance there may occur an answer calling for matter especially pleaded by way of estoppel, or otherwise, as for instance the Statute of Limitations, Statute of Frauds, Res Adjudicata, or defenses in suspension or abatement of the writ. What particular relation have these and other similar special pleadings to the syllogistic premises set out in the plaintiff's complaint or declaration? Unquestionably we have here another example of what was pointed out in the first chapter to be a variance of legal logic from ordinary logic. Somewhat in the nature of an avoidance without a confession, it does not deny the truth and validity of the rule of law to the case, nor does it question its applicability to the facts as alleged in the Minor Premise, but it does a very unique thing--it invokes

> a wider rule of law within which the rule plead in the first pleading is but a part, just as in Confession and Avoidance, a wider sphere of fact was plead--and thus it challenges the right of the plaintiff to put the special set of facts in issue. Hence, a greater rule of law is plead against a lesser, a more comprehensive syllogism over a lesser - the first plead by alleging the Minor Premise and implying the Major Premise, the second by pleading the Major Premise and implying the Minor Premise." (Our emphasis.)

Applying Brumbaugh's reasoning to the facts at hand, there can be no denying of the fact that the "padlock" will prevent the showing of films at the Fox Cinema in the future--films as to which there has not been no adversary hearing. The legal effect of that admission, however, does not require the conclusion thereafter drawn by the Alabama Supreme Court. The "new matter" which has been pleaded (that is the factual finding that a moral public nuisance has been shown to exist at that address) invokes a wider rule of law; namely, that a forfeiture penalty (loss of lease) may be exacted in connection with an illegal use--within which the original rule pleaded is but a part--and thus

it challenges the right of the respondent to put the special set of facts in issue.

On the above matter, consider the following second syllogism:

Major Premise: Under the ancient doctrine of deodand expressed in U.S. v. U.S. Coin and Currency, supra, and One Lot of Emerald Cut Stones and One Ring v. U.S., supra, where a place is determined in a legal proceedings to be operating as a public nuisance involving contraband, a penalty may be applied forfeiting the leasehold interest in the real property used in conducting such nuisance for a period of up to one year.

Minor Premise: The Alabama Public Nuisance Statute, operates to prevent the showing of films in the future without an adversary hearing on the obscenity of those films through forfeiture of the leasehold (use of the premises) as a penalty.

Conclusion: The Alabama Public Nuisance Statute is constitutional.

Instead of according the state lawsuit its historical treatment as one which involved the status of real property and a determination of whether or not the "res" constituted a public nuisance as to which certain statutory penalties could be applied, namely the forfeiture of the leasehold interest in such property (a legal

equivalent of "loss of use for a year") and the forfeiture of the personal property used therein - an approach which presented absolutely no constitutional questions, see U.S. v. U.S. Coin and Currency, 401 U.S. 715, 23 L.Ed.2d 434, 91 S.Ct. 1041 (Apr. 5, 1971), One Lot of Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 34 L.Ed. 2d 438, 92 S.Ct. 489 (Dec. 11, 1972) - the Court erroneously fixed its attention on particular language within the statute which, when viewed by itself, as an in personam restriction against an individual, gave the mistaken appearance of being subject to attack under the Near v. Minnesota, supra, "prior restraint" doctrine.

CONCLUSION

Petitioner submits that the "padlock" provision mandated by the Alabama Legislature in Title 7, section 1101, is not prohibited by the federal constitution, and is entirely within the legislative powers of government and the traditional equity powers of the state courts. Further, the procedural aspect of this case identifies it as an ideal vehicle for resolving

this critical issue of constitutional law. 3/ Petitioner submits that, as a practical matter, the "padlock" penalty provides the only means whereby the Cities may rid themselves of these rapidly-spreading pornographic moral nuisances. Petitioner submits that the mandatory padlock feature of the Red Light Abatement Act provides a type of relief which cannot be expected to flow from a general application of the criminal laws dealing with obscenity (see footnote 1 at

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3. See "Reasons For Granting The Writ" at page 26, supra. The identical issue (but from the more favorable advantage of the federal "padlock" issue having been upheld in the state trial court) was presented to this Court in Lawrence S. Huffman as Prosecuting Attorney for Allen County, Ohio et al. v. Pursue Ltd., No. 73-296 (see page 23-24, supra). The procedural issue in Huffman, supra, and this Court's disposition of that matter did not, however, permit a ruling on the critical "padlock" issue. Huffman et al. v. Pursue, Ltd., ___ U.S. ___, 43 L.Ed.2d 482, ___ S.Ct. ___ (Mar. 18, 1975). The state appellate route, pursued herein, follows the advice of this court in Huffman et al. v. Pursue, Ltd., supra, and MTM, Inc. v. Baxley, ___ U.S. ___43 L.Ed.2d 636, __ (Mar. 25, 1975). It may be noted that the respondent herein, General Corporation, was also a federal plaintiff in a federal case against this petitioner which was consolidated with, and ruled upon by the three-judge federal district court in MTM, Inc. v. Baxley. In the latter case, General Corporation did not join MTM, Inc. in appealing the three-judge court ruling to this court.

pages 3-4 supra.). Used in conjunction with the recordation of a lis pendens, as was done in the cause herein, the certainty, clarity, and mandatory nature of the Red Light Abatement provisions permit law enforcement to justly achieve its objective by:

1. avoiding fraudulent assignments and transfers, and

2. placing the real property owners and assignees on notice as to what their obligations are under the circumstances and what they may justly expect.

Where the porno theater real estate is owned by or can be traced to the operators of the porno theater and their profits, the entire cost of abatement can be levied upon the cause of the nuisance.

The Writ of Certiorari should be granted as prayed for.

Dated: January 16, 1976

Respectfully submitted,

James J. Clancy
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 1976, copies of the within Petition for Writ of Certiorari were mailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties required to be served have been served.

Mr. Frierson M. Graves Jr.
Suite 2020 First National Bank Bldg.
Memphis, Tennessee 38103

Morring, Giles, Watson & Willisson
401 Franklin Street, S.E.
Huntsville, Alabama 35801

James J. Clancy
Attorney for Petitioner

APPENDIX A

Complaint and Application for Temporary and Permanent Injunction to Abate a Nuisance, filed on January 16, 1973 in State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation, a corporation organized and existing under the laws of the State of Alabama; Charles E. Outland: Floyd G. Bradford; Mary Roe; A.B.C. Corporation; X.Y.Z. Corporation; John Doe #1; John Doe #2; John Doe #3; and John Doe #4, Circuit Court in Equity, Case No. 30847

. . . . . A3 - A17

CIRCUIT COURT IN EQUITY
Case No. _____

STATE OF ALABAMA

MADISON COUNTY

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama
PETITIONER

vs.

GENERAL CORPORATION, a corporation organized and existing under the laws of the State of Alabama; CHARLES E. OUTLAND; FLOYD G. BRADFORD; MARY ROE; ABC CORPORATION; XYZ CORPORATION; JOHN DOE #1; JOHN DOE # 2, JOHN DOE # 3; and JOHN DOE # 4
RESPONDENTS

COMPLAINT AND APPLICATION FOR TEMPORARY AND PERMANENT INJUNCTION TO ABATE A NUISANCE

Comes now, The State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Petitioner, and for its cause of action in equity to abate the motion picture theater known as Fox Cinema as a public nuisance in Madison County, Alabama, states:

1. That he is the Chief of Police of the City of Huntsville, Alabama, and is a citizen of Madison County, State of Alabama, over the age of 21 years, and brings this action in equity

in the name of the State of Alabama as authorized by the State Legislature in Chapter 31, Article 2 of Title 7, Code of Alabama, 1940;

2. That the Respondent, General Corporation, is a corporation organized and existing under the laws of the State of Alabama and doing business in Huntsville, Alabama;

3. That said corporation operates a motion picture theater business, for profit, open to and soliciting patrons from the general public, called Fox Cinema, located at 205 East Side Square, Huntsville, Alabama; that said business has been opened for a period of time more than 19 months prior to the filing of this bill.

4. That the Respondent, Mary Roe, whose true name is unknown to Petitioner, but whose name will be added by amendment when ascertained, is a resident of Madison County, Alabama, over the age of 21 years and of sound mind, and is the manager and person in control of the operation of the Fox Cinema Theater;

5. That your Petitioner is informed and believes that the owner of the building in which the Fox Cinema Theater is operated, and the lands upon which same is located, is Kate Milligan Wyatt, whose address is 504 Eustis Avenue, S.E., Huntsville, Alabama, and said property is particularly described as follows, to-wit:

205 East Side Square, S.E., Huntsville, Alabama. That part of Lot 1, Block 33, according to the Quigley Map of the City of Huntsville, Madison County, Alabama, particularly described as being the three story brick building fronting on East Side Square 39' 1" and being 99' 6" deep, being the same premises formerly leased to J.C. Penney Co. by that certain instrument dated 7-20-61, and filed for record 10-5-61 in Deed Book 300 at page 541 in the Office of Probate Recorder, Madison County, Alabama.

6. That your Petitioner is informed and believes, and based upon such information and belief, Petitioner states and charges that the Respondents, Charles E. Outland and Floyd G. Bradford, whose residence addresses are unknown to Petitioner, are president and vice president respectively of Respondent General Corporation, and are stockholders therein and members of the Board of Directors thereof, and as such are now deriving, and have derived in the past, substantial revenues from the exhibitions of various motion picture films shown at Fox Cinema Theater, including those specifically named in this Bill, and that said Respondents are over 21 years of age and of sound mind;

7. That the Respondents, ABC Corporation, XYZ Corporation, John Doe #1, and John Doe #2, whose true names are unknown to Petitioner, but whose names will be added by amendment when

ascertained, own certain distribution rights in various motion picture films heretofore shown at Fox Cinema Theater in the course of said theater business and are now, and have been in the past, deriving substantial revenues from the exhibition of said motion picture films, including those films specifically named herein;

8. That at all times hereinafter mentioned, Respondents,Charles E. Outland, Floyd G. Bradford, and Respondents, John Doe #3 and John Doe #4, whose true names are unknown to Petitioner, but whose true names will be added by amendment when ascertained, and each of them were and now are principals and alter egos of Respondent, General Corporation, a corporation, and are executive officers, directors, or stockholders of said Respondent, and are beneficially interested in the income, profit, and financial success of said corporation, and have dominated, influenced, and controlled the business and affairs of said corporation. There is such a unity of interest and ownership between said Respondents, and each of them, and General Corporation, that the individuality and separateness of said individual Respondents and said corporation has ceased. Adherence to the fiction that the Respondent, General Corporation, a corporation, has separate existence from

Respondents, Charles E. Outland, Floyd G. Bradford, John Doe #3 and John Doe #4, would, under the circumstances, sanction a fraud and promote an injustice.

9. That for a period of time in excess of 19 months, the Respondents, through the Fox Cinema Theater, have consistently shown lewd and obscene motion picture films in the City of Huntsville, County of Madison, which films have violated the laws of the State of Alabama; that such use of the premises described above establishes said premises as a nuisance and as such the same should be abated;

10(a) That the showing to the public at said theater on the play dates December 20, 1972 to December 26, 1972, inclusive, of the motion picture "Making The Blue Movie" and an unnamed second feature was a violation of the obscenity and nuisance laws of the State of Alabama;

10(b) That the showing to the public at said theater on the play dates December 27, 1972 to January 2, 1973, inclusive, of the previews of coming attractions and motion pictures "Gun Runners" and "Mary Jane" was a violation of the obscenity and nuisance laws of the State of Alabama;

10(c) That the showing to the public at said theater on the play dates January 3, 1973

to January 9, 1973, inclusive, of the motion picture films, "Sandra, The Making of a Woman", and "Mary Jane", was a violation of the obscenity and nuisance laws of the State of Alabama;

11. That attached hereto as Appendices 1A, 1B, 2A, 2B, 2C, 3A and 3B, and incorporated herein by reference as though fully set out, are accurate time and motion studies of each of the films named in paragraph 10 hereof, which time and motion studies consist of a chronological series of photographs of each film, timed in their relative order of appearance, which photographs fairly and accurately depict the conduct visually portrayed on the motion picture screen;

12. That on or about the 10th day of January, 1973, the Respondent began showing the motion pictures, "Mermaids", and "Grabbers", at the Fox Cinema Theater, in violation of the obscenity and nuisance laws of the State of Alabama;

13. That the past and continuing exhibition of said motion picture films at the Fox Cinema Theater, all of which are lewd and obscene under the laws of the State of Alabama, did and does constitute a nuisance under the laws of the State of Alabama, in that (1) the dominant theme of said motion picture films, taken as

a whole, appeals to the prurient interest in sex; and (2) said motion picture films are patently offensive because they affront contemporary community standards relating to the description or representation of sexual matters; and (3) said motion picture films are utterly without redeeming social value, which three elements coalesce;

14. That the exhibition of said motion picture films at the Fox Cinema Theater is a violation of Section 2, Acts of Alabama, 1969, page 1254, approved September 10, 1969, and other sections of the Code of Alabama, and said exhibitions cause moral pollution of the community and will cause and result in immediate and irreparable harm and damage to the morals and welfare of the people of the State of Alabama;

15. That the exhibition of the motion picture films hereinabove alleged to have been exhibited by Respondents constitutes a public nuisance at common law and as that term is defined in Section 1091, Code of Alabama, 1940, which reads as follows:

> "Section 1091. DEFINITIONS.-- For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion

thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose."

for the following reasons:

(a) Visual depiction of the private parts of the body in public, or the visual depiction of sex acts in public, whether real or simulated, under the circumstances prevailing in this case, is conduct which is contrary to good morals, public decency, and the long-standing public policy of the people of the State of Alabama as expressed by the State Legislature in enacting Acts of Alabama, 1969, page 1253, approved September 10, 1969, and other sections of the Code of Alabama.

(b) The conduct described in subparagraph (a) above, if performed offstage and in public in three-dimensional form, would constitute violations of the laws of the State of Alabama, regulating public displays of such sexual activity, and reproduction on the motion picture

screen in public in two-dimensional form, in the manner indicated, and under the circumstances prevailing, is contrary to good morals and public decency and constitutes obscenity as a matter of law.

(c) Such conduct is demonstrated by the following visual depictions in the time and motion studies attached hereto as Appendices 1A through 3B:

Appendix 1A -- "Making The Blue Movie", fellatio depicted on page 1; group sex depicted on page 2; intercourse depicted on page 3; intercourse and fellatio depicted on page 4; masturbation depicted on page 5; intercourse depicted on page 6; intercourse, group sex and fellatio depicted on page 7; lesbianism and intercourse depicted on page 8; group sex, fellatio and intercourse depicted on page 9; intercourse and group sex depicted on page 10; intercourse depicted on page 11;

Appendix 1B -- Unnamed second feature, lesbianism and masturbation depicted on page 1; lesbianism depicted on page 2; intercourse depicted on page 4;

Appendix 2A -- Previews, lesbianism depicted on page 1; fellatio and intercourse depicted on page 2;

Appendix 2B -- "Gun Runners", intercourse

(seduction) depicted on page 1; intercourse depicted on page 2 and 3; voyeurism, intercourse, and auto eroticism depicted on page 5; intercourse depicted on page 6;

Appendix 2C -- "Mary Jane", intercourse, cunnilingus and group sex depicted on page 1; intercourse and group sex depicted on page 2; intercourse, fellatio, cunnilingus, lesbianism and group sex depicted on page 3; masturbation, lesbianism, cunnilingus and group sex depicted on page 4; cunnilingus, lesbianism and group sex depicted on page 5; cunnilingus, fellatio, intercourse and group sex depicted on page 6; lesbianism, fellatio, cunnilingus, and intercourse depicted on page 7; lesbianism, fellatio and intercourse depicted on page 8; intercourse depicted on page 9; group sex and intercourse depicted on page 10; group sex, fellatio and intercourse depicted on page 11;

Appendix 3A -- "Mary Jane", fellatio, intercourse, cunnilingus, and group sex depicted on page 1; group sex, and cunnilingus depicted on page 2; cunnilingus, group sex, intercourse, lesbianism, and auto eroticism depicted on page 3; lesbianism depicted on page 4; lesbianism, group sex, and cunnilingus depicted on page 5; cunnilingus, group sex, lesbianism, and intercourse depicted on page 6; fellatio, cunnilingus,

lesbianism, and intercourse depicted on page 7; intercourse, fellatio, lesbianism, and fellatio depicted on page 8; fellatio, intercourse, and lesbianism depicted on page 9; group sex, and lesbianism depicted on page 10; group sex, consisting of cunnilingus, fellatio, and intercourse depicted on page 11; group sex depicted on page 12; grpup sex depicted on page 13;

Appendix 3B -- "Sandra, The Making of a Woman", intercourse depicted on page 1; intercourse and auto eroticism depicted on page 2; auto eroticism and intercourse depicted on page 3; voyeurism, cunnilingus, and fetishism depicted on page 4; lesbianism depicted on page 5; sadomachochistic sex, and intercourse depicted on page 6; intercourse depicted on page 7; intercourse depicted on page 8;

That each and all of the foregoing acts and the conduct of the Respondents in the use of said property for the use and purposes and in the manner aforesaid, interferes with the tranquility, peace, and quiet, generally, of Petitioner and citizens of the City of Huntsville, Alabama, and the nearby communities, and constitutes unlawful, unwarranted, and unreasonable use of Respondent's property to the extreme annoyance, disturbance, discomfort, and hurt of Petitioner, and is detrimental to the public

good and to the common welfare; such lewd acts and conduct are offensive to public decency, morals, peace, and health, and constitute a public nuisance which is subject to abatement under Chapter 31, Title 7, Code of Alabama, 1940, and should be forthwith enjoined and abated; and unless enjoined by the Court, the Respondents, and each of them by themselves, and through their agents or representatives, will continue to exhibit the motion picture films, and other films referred to in paragraph 12 hereof similar to those herein specifically mentioned at the Fox Cinema Theater;

17. That before the commencement of this action, a verified complaint alleging the facts constituting the nuisance was filed in the Office of the Probate Judge of Madison County, together with a notice of the pendency of the action, containing the name of the Court, the names of the parties, the object of the action, and a brief description of the property affected thereby.

WHEREFORE, Petitioner prays:

1. That this Court take jurisdiction over the Bill of Complaint and Petition as herein presented, and that the said General Corporation, a corporation organized and existing under the laws of the State of Alabama; Charles E. Outland,

Floyd G. Bradford, Mary Roe; ABC Corporation; XYZ Corporation; John Doe #1; John Doe #2; John Doe #3; and John Doe #4, be made parties respondent to this cause, and that proper process of this Court will issue to the Respondents named herein requiring them to plead, answer, or demur to this Bill of Complaint within the time allowed by law;

2. That the Court after notice and hearing, issue a preliminary injunction, (a) enjoining and restraining the Respondents pendente lite from maintaining such nuisance, and (b) closing the place known as Fox Cinema against its use by the Respondents as a motion picture theater until final decision shall be rendered on the application for a permanent injunction, and (c) requiring an accounting of the box office receipts arising out of the exhibition of the above-named motion picture films; that at the time and place so fixed, the Respondents be required to appear with the above-named motion picture films and each of them, and show cause, if any they have, at said hearing, why an injunction should not be issued, and why an accounting should not be ordered of all box office receipts arising out of the exhibition of said motion picture films from the first exhibition thereof in the State of Alabama to and including the final performance

after termination of any appeal in favor the the State of Alabama, and the same forfeited to the State of Alabama as contraband upon final determination of any appeal in favor of the State of Alabama;

3. That after final hearing, the Respondents, and all of them, and all persons acting by, through, under or in concert with them be permanently and perpetually enjoined and restrained from exhibiting said motion picture films, and films of like or similar kind or description, and maintaining the nuisance at the place complained of, and that the Respondents be permanently and perpetually enjoined from maintaining such nuisance elsewhere in the county;

4. That Petitioner have judgment for costs of abating said public nuisance, including reasonable attorneys fees, and the reasonable costs of investigating the charges herein made and the preparation of the matters relating to this action, and for such other, further, and different relief to which in equity and good conscience it may be entitled.

Attorneys for the Petitioner

_____

Charles H. Younger

_____

E. Cantey Cooper

Martinson, Manning & Martinson

BY: _____

Glenn F. Manning

A.S. Johnston, III
Schan Building
122 W. Howard Ave.
Biloxi, Miss. 39533
(OF COUNSEL)

STATE OF ALABAMA

MADISON COUNTY

Before me, _____, a Notary Public in and for said County and State, on the _____ day of January, 1973, personally appeared _____, known to me, and being sworn by me, he stated that he has read the above Bill of Complaint, and knows the contents thereof, and that the same are true of his own knowledge, except as to matter which are therein stated to be on his information and belief, and as to those matters he is informed and believes them to be true.

Sworn and subscribed before me this ___ day of _____, 1973.

_____

NOTARY PUBLIC

APPENDIX B

Final Decree of Circuit Judge John D. Snodgrass, filed on February 23, 1973 in State of Alabama on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation; Charles E. Outland; Floyd G. Bradford, In the Circuit Court In Equity, Case No. 30847

. . . . . B3 - B5

B-3

IN THE CIRCUIT COURT, IN EQUITY
CASE NO. 30847

STATE OF ALABAMA
COUNTY OF MADISON

STATE OF ALABAMA on the relation of EUGENE SWEETON, Chief of Police of the City of Huntsville, Alabama

PETITIONER

vs.

GENERAL CORPORATION, CHARLES E. OUTLAND, FLOYD G. BRADFORD

RESPONDENTS

FINAL DECREE

This cause being submitted for final decree on the Pre-Trial Orders of February 13 and February 22, 1973, the pleadings, stipulations and the evidence, the Court finds as follows:

1. The respondent, General Corporation, an Alabama corporation operated the "Fox Cinema" at 205 East Side Square, Huntsville, Alabama. That the respondent, Jean Phillips, is the manager of said theater.

2. The evidence shows the respondents have shown obscene movies as defined by Title 14 § 374(16j) et.seq., Code of Alabama 1940 (Recomp. 1958), by Roth v. U.S. 354 U.S. 476, 1 L Ed. 2d 1498, 77 S. Ct. 1304 or by any other standard

that this Court is aware. "Obscene" means lewd, Title 14 § 374 (3) Code of Alabama 1940 (Recomp. 1958). "Lewd" means "obscene" Black's Law Dictionary 4th Ed. p. 1052.

3. Title 7 § 1091 Code of Alabama 1940 (Recomp. 1958) provides that a place where lewdness is conducted, permitted, continued or exists shall constitute a nuisance.

4. The Court finds the respondents have operated their theater so as to constitute a public nuisance under the laws of this State. No intent was shown by the respondents to operate their place of business other than as a public nuisance nor that they had ever operated said theaters in any other manner.

5. That the respondents contentions as outlined in the Pre-Trial Order of February 13, 1973 are not sufficient to deny the relief sought by the petitioner.

It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:

1. That the respondents are perpetually enjoined from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama or elsewhere in the county.

2. That all personal property and contents used in conducting the nuisance shall be removed from 205 East Side Square, Huntsville, Alabama,

and this personal property shall be sold in the manner provided for the sale of chattels under execution.

3. That the theater, Fox Cinema, located at 205 East Side Square, Huntsville, Alabama shall be closed for any purpose for the period of one year unless sooner released pursuant to Title 7 § 1104 Code of Alabama 1940 (Recomp. 1958).

4. That the proceeds of the sale of the personal property shall be applied in payment of costs of action and abatement and petitioner's costs.

5. Petitioner is denied attorney's fees and the accounting.

This the 23rd day of February, 1973.

/s/
JOHN D. SNODGRASS
Circuit Judge

FED THROUGH

APPENDIX C

Amendment to Final Decree of Circuit Judge John D. Snodgrass, filed on March 23, 1973 in State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama v. General Corporation, a Corporation Organized and Existing Under the Laws of the State of Alabama, et al., In the Circuit Court, In Equity, Case No. 30847

. . . . . C3 - C7

C-3

IN THE CIRCUIT COURT, IN EQUITY
CASE NO. 30847

STATE OF ALABAMA
MADISON COUNTY

STATE OF ALABAMA, ON THE RELATION
OF EUGENE SWEETON, CHIEF OF POLICE
OF THE CITY OF HUNTSVILLE, ALABAMA

PETITIONER

vs.

GENERAL CORPORATION, A CORPORATION
ORGANIZED AND EXISTING UNDER THE
LAWS OF THE STATE OF ALABAMA; ET ALS

RESPONDENTS

AMENDMENT TO DECREE

This Court having entered a decree on the 23rd day of February, 1973, in the above-styled cause, permanently enjoining the Respondents General Corporation and Jean Phillips from maintaining a nuisance at 205 East Side Square, Huntsville, Alabama, or elsewhere in Madison County, Alabama, and granting the Petitioner other relief, and the Court on the motion of the complainants being of the opinion that its said decree should be more definitive, and should more clearly and precisely reflect the intent of the Court in

rendering said decree, it is hereby

ORDERED, ADJUDGED AND DECREED by the Court that said decree made and entered in this cause on the 23rd day of February, 1973, be, and the same hereby is, amended by deleting all words and figures from said decree which immediately follow the words "It is therefore CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court:", and by substituting, in lieu of said deleted portion of said decree, the following

"1. That the Respondent General Corporation, a corporation organized and existing under the laws of the State of Alabama, and the Respondent Jean Phillips, and any and all persons, be, and they are hereby, perpetually enjoined from continuing to maintain a "nuisance", as defined by Sections 1091 and 1092 of Title 7 of the Code of Alabama 1940, on those premises located at 205 East Side Square, Huntsville, Alabama, known as the "Fox Cinema", and which are more particularly described in the paragraph numbered 5 of the original Bill of Complaint in this cause, which description is incorporated into this decree, and made a part hereof by reference, and the Respondent General Corporation and the Respondent Jean Phillips are perpetually enjoined and restrained

from maintaining such a nuisance elsewhere in Madison County, Alabama.

2. That, notwithstanding the provisions of the immediately preceding paragraph of this decree, said Respondents are not enjoined and restrained from operating a motion picture theatre, or engaging in any other form or kind of speech or expression which is not "obscene" as the word "obscene" is presently, or shall hereafter be, defined by a controlling decision of the Supreme Court of the United Stated, or by the Supreme Court of Alabama, whichever definition shall be less restrictive, and this decree shall not be construed to prohibit any conduct which is protected by the Constitution of the United States, the Constitution of Alabama, Acts of Congress of the United States, or Acts of the Legislature of Alabama, and the said Respondents are enjoined only from using, occupying, establishing, or conducting a building, erection, or place, or any separate part of portion thereof, or the ground itself, in or upon which "lewdness", in the same sense as "obscenity", is conducted, permitted, continued, or exists.

3. That all personal property and contents situated in or on the hereinbefore described premises, which the Court hereby finds was used in conducting and maintaining such nuisance,

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shall be removed from said premises by the Sheriff of Madison County, Alabama, who shall sell same in the manner provided for the sale of chattels under execution, and the proceeds of the sale of same, or so much of such proceeds as may be necessary shall be applied by the Court in payment of the costs of this action and abatement, including Complainant's costs, and in payment of the fees allowed by law to the Sheriff for removing and selling said personal property and contents, and for closing the place and keeping it closed.

4. That said nuisance shall be, and the same hereby is, abated, and the said theatre building known as "Fox Cinema," and the above-described lands on which same is located, be, and the same hereby are, closed for a period of one year from the 23rd day of February, 1973, and said building and premises are hereby enjoined and restrained against use for any purpose by any person, firm, or corporation for such period of time, unless sooner released.

5. That the Register issue a writ of permanent injunction, directed to said Respondents, enjoining and restraining them as above set out.

6. That Petitioner is denied the accounting and attorneys' fees prayed for in the original Bill.

7. That jurisdiction over this cause is retained for such further orders and decrees as may be necessary or appropriate in the premises."

Done this 23 day of March, 1973.

/s/ John D. Snodgrass
Circuit Judge

APPENDIX D

Opinion of the Supreme Court of Alabama in General Corporation, a corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, 320 So. 2d 668, filed on September 18, 1975

. . . . . D3 - D19

[5] The evidence in the record does not ow a change in circumstances in this se which would bar the relief requested counterclaimants.

Affirmed.

HEFLIN, C. J., and MERRILL, LOODWORTH, MADDOX, FAULKER, JONES, ALMON and SHORES, JJ., ncur.

GENERAL CORPORATION, a corporation,

v.

STATE of Alabama ex rel. Eugene SWEETON, Chief of Police, City of Huntsville, Alabama.

SC 521.

Supreme Court of Alabama.

Sept. 18, 1975.

State filed a complaint under the Red ight Abatement Act seeking to abate as a uisance adult movie theatre which allegly showed obscene films. The Circuit ourt, Madison County, John D. Snodass, J., entered a judgment ordering there closed for one year, and the operator the theatre appealed. The Supreme ourt, Almon, J., held that the Red Light batement Act was applicable to obscene aterial; that burden of proof in action as upon the State; and that closing, for y purpose for one year, of theatre pursuit to statute authorizing the abatement, as nuisance, of a place where lewdness is nducted was unconstitutional as a prior straint of First Amendment rights.

Reversed and remanded.

Jones, J., concurred in the result.

Maddox, J., concurred specially.

Heflin, C. J., filed an opinion concurng in the result in which Bloodworth and ores, JJ., joined.

1. Constitutional Law ⇐90.1(1)

Patently obscene expression falls outside protection of First Amendment and enjoys no immunity from state regulations. (Per Almon with three Judges concurring four Judges concurring in the result and one Judge concurring specially.) U.S.C.A. Const. Amend. 1.

2. Obscenity ⇐1

Primary requirements of decency may be enforced against obscene publications. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C. A.Const. Amend. 1.

3. Constitutional Law ⇐90.1(1)

Due to elevated status ascribed to First Amendment guarantees, procedures adopted by states for dealing with obscene expression are subject to close judicial scrutiny. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

4. Constitutional Law ⇐90(3)

Line between expression unconditionally guaranteed and that which may be legitimately regulated is finely drawn. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A. Const. Amend. 1.

5. Constitutional Law ⇐90.1(6)

Although motion pictures are a form of expression and within the shield of First Amendment, they are not necessarily subject to the same rules governing other modes of expression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

6. Constitutional Law ⇐90.1(6)

Because of the singularly unique nature of the medium, a motion picture may

be denominated obscene and thereby exceed protective bounds of First Amendment long before written description of same subject matter. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

7. Nuisance ⇐61

Although regulation of obscene expression is unquestionably a legitimate matter for state control, it does not necessarily follow that doctrine of public nuisance can be constitutionally applied to obscenity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

8. Nuisance ⇐61

Continuing activity contrary to public morals or decency constitutes public nuisances. (Per Almon with three Judges, concurring, four Judges concurring in the result and one Judge concurring specially.)

9. Nuisance ⇐80

Under the police power, court of equity with proper legislative authorization can assume jurisdiction to abate a nuisance notwithstanding the fact that maintenance of nuisance may also be a violation of criminal law. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

10. Constitutional Law ⇐90.1(1)

Three requirements imposed by First Amendment upon any statute which attempts to regulate obscene material: (1) burden of proving obscenity always rests with the State; (2) administrative action determining matter to be obscene must not have air of finality—there must be provision for prompt judicial review; (3) where prior restraint exists, there must be an immediate final determination on issue of obscenity. (Per Almon with three Judges concurring, four Judges concurrin in the result and one Judge concurring spe cially.) U.S.C.A.Const. Amend. 1.

11. Constitutional Law ⇐90.1(1)

Nuisance ⇐61

There is a dichotomy in social ill against which obscenity law and publi nuisance law are directed; definitional tes for obscenity attempts to separate materi als protected by guarantees of freedom o expression; aim of a nuisance action i not the suppression of a particular form o expression, rather the abatement of a con dition which works harm upon a substan tial number of public or which injuriously affects public safety, health, or morals (Per Almon with three Judges concurring four Judges concurring in the result and one Judge concurring specially.)

12. Obscenity ⇐2

Three-prong test for "hard-core pornography" embodied in statute defining obscenity is more stringent than subsequent doctrine announced in Miller decision in which United States Supreme Court set forth demands for determining whether work depicting sexual conduct is obscene. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 14, § 374(16j)

13. Nuisance ⇐61

Red Light Abatement Act authorizing the abatement, as a nuisance, of a place where lewdness is conducted, permitted, continued or exists is applicable to obscene material. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091.

14. Nuisance ⇐61

Under the common law, acts contrary to public morals were considered as public nuisances and subject to abatement as such. (Per Almon with three Judges con-

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curring, four Judges concurring in the result and one Judge concurring specially.)

15. Nuisance ⇐84

Burden of proof in action under Red Light Abatement Act falls upon the State. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091.

16. Nuisance ⇐60

Although Red Light Abatement Act does provide for issuance of temporary injunction after filing of original complaint, in that a hearing thereon must be had within 10 days, Act meets constitutional requirement of providing prompt judicial review of administrative or executive suppression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, §§ 1095, 1096.

17. Nuisance ⇐60

Preadjudicatory restraint imposed by Red Light Abatement Act in the form of temporary injunction of nuisance is saved by other mandatory provisions in Act insuring speedy final resolution of ultimate issue of obscenity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, §§ 1095, 1101, 1103.

18. Constitutional Law ⇐90.1(1)

Any system for regulation of obscene expression involving prior restraint comes to court bearing heavy presumption against its validity. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

19. Constitutional Law ⇐90.1(1)

Evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

20. Constitutional Law ⇐90.1(6)

Closing, for any purpose for one year, of adult movie theatre which allegedly showed obscene motion pictures pursuant to statute authorizing the abatement, as a nuisance, of a place where lewdness is conducted or exists was unconstitutional as prior restraint of First Amendment guarantees. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1091; U.S.C.A. Const. Amend. 1.

21. Nuisance ⇐60

Provision in Red Light Abatement Act allowing release on bond if there is no knowledge of existence of nuisance is not curative of constitutional defect arising from unconstitutional application of Act resulting from the prior restraint of allegedly obscene expression. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) Code of Ala., Tit. 7, § 1104.

22. Obscenity ⇐5

Motion pictures which depicted, inter alia, sexual intercourse, fellatio, group sex, lesbianism, fettishism, and sadomasochistic sexual activities were obscene. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.)

23. Constitutional Law ⇐90.1(1)

Even if one is guilty of maintaining an obscenity nuisance, it is not constitutionally permissible to deprive him prospectively of his First Amendment rights. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C. A.Const. Amend. 1.

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24. Constitutional Law ⇐90(3)

Doctrine of nuisance cannot serve as means of circumventing First Amendment safeguards. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

25. Constitutional Law ⇐90(3)

Requirements of First Amendment are stringent and demanding and any regulatory scheme impinging upon such rights is assured of close scrutiny. (Per Almon with three Judges concurring, four Judges concurring in the result and one Judge concurring specially.) U.S.C.A.Const. Amend. 1.

Frierson M. Graves, Jr., Memphis, Tenn., for appellant.

Watts, Salmon, Roberts, Manning & Noojin, Huntsville, for appellee.

ALMON, Justice.*

The question presented by this appeal is whether the Alabama Red Light Abatement Act, Tit. 7, § 1091 et seq., Code of Alabama 1940, Recompiled 1958, can be constitutionally applied to the exhibition of obscene motion pictures. More specifically, whether the showing of obscene motion pictures constitutes a public nuisance, the sanction for which is the padlocking of the premises for up to one year.

The complaint filed January 16, 1973, alleged that for a period in excess of nineteen months, appellant had consistently shown obscene films at the Fox Cinema Theatre and that the showing of certain of these films constituted a violation of both the nuisance and obscenity laws of the State of Alabama. The complaint prayed for issuance of a preliminary injunction after notice and hearing, and that after a final hearing on the issue of obscenity, appellant, General Corporation, be perpetually enjoined from maintaining said nuisance.

The pretrial order, issued on February 13, 1973, set out the contentions of the respective parties including a stipulation that the Fox Cinema Theatre was an exclosed adult movie house. A supplemental pretrial order was issued on February 22, 1973, stipulating that the issues in controversy were, whether the conduct of appellant constituted "lewdness" under Tit. 7, § 1091, Code, supra.

On February 23, 1973, the final decree of the trial court was entered. Specifically, the trial judge found that appellant had engaged in showing obscene movies at the Fox Cinema Theatre and that such activity constituted a public nuisance. Pursuant to that finding, the court decreed that appellant be perpetually enjoined from maintaining said nuisance at the Fox Cinema Theatre or elsewhere in the county; that all personal property contained in the theatre be removed and sold in the manner provided for the sale of chattels under execution; that the theatre be closed for all purposes for one year unless sooner released under the provisions of Tit. 7, § 1104, Code, supra; and that the proceeds of the sale be applied to the costs. A writ of injunction was issued embodying the terms of the final decree.

On March 23, 1973, the court amended its final decree specifically limiting its operation to obscene matter, but leaving undisturbed the provision closing the theatre for one year.

The evidence showed that appellant was engaged in the operation for profit of the Fox Cinema Theatre, situated in Huntsville, Alabama. During the period of December 20, 1972, through January 10, 1973, inclusive, Mr. Ron Curlee, a detective employed by the Huntsville Police Depart-

* This case was originally assigned to a justice formerly on this court. It has been reassigned to the writer who has listened to the tape recordings of the oral argument.

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ment, visited the Fox Cinema Theatre on several occasions. During these visits Mr. Curlee took numerous sequential photographs and recorded contemporaneous audio tapes of the films which were being exhibited at the theatre. These motion picture films were entitled: "The Making of the Blue Movie," "I am Sandra," "Mary Jane," "The Gun Runners," "The Executive Wives," and "The Mermaids." At trial Mr. Curlee, referring to the notes and pictures he had taken while at the theatre, testified as to the subject matter content of each of the foregoing films. That testimony tended to show that said films depicted, *inter alia*, sexual intercourse, fellatio, cunnilingus, group sex, lesbianism, auto-eroticism, fettishism, voyeurism, and sado masochistic sexual activities.

The State's contention below was that the movies exhibited at the Fox constituted a public nuisance in that they were "obscene," and that under the provisions of Tit. 7, § 1091, et seq. (the Alabama Red Light Abatement Act) the operation of the theatre was subject to abatement. Appellant's position was that this Act was not intended to apply to motion picture films or, in the alternative, if the legislature did so intend, such application is unconstitutional.

[1, 2] Any doubts that patently obscene expression falls outside the protection of the First Amendment and therefore enjoys no immunity from state regulations have long been laid to rest. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). "The primary requirements of decency may be enforced against obscene publications." *Near v. State of Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). More recently the United States Supreme Court has reaffirmed the principle that the states have a legitimate interest in regulating the use of obscene material; and, more specifically, that local regulations dealing with such material will not be disturbed or struck down so long as they comport with specific constitutional mandates. *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973).

[3, 4] However, due to the elevated status ascribed to First Amendment guarantees, procedures adopted by states for dealing with obscene expression have been the subject of close judicial scrutiny. *Marcus v. Property Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). The line between expression unconditionally guaranteed and that which may be legitimately regulated is finely drawn. *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958).

[5, 6] Although motion pictures are a form of expression and within the shield of the First Amendment, *United States v. A Motion Picture Film*, 404 F.2d 196 (2d Cir. 1968), they are not necessarily subject to the same rules governing other modes of expression. *Burstyn v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1951). Because of the singularly unique nature of the medium, a motion picture may be denominated obscene and thereby exceed the protective bounds of the First Amendment long before a written description of the same subject matter. *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal.Rptr. 177, aff'd 388 U.S. 456, 87 S.Ct. 2109, 18 L.Ed.2d 1317 (1966); *People v. Bloss*, 18 Mich. App. 410, 171 N.W.2d 455 (1969). Moreover, the United States Supreme Court has expressly rejected constitutional immunity from state regulation for obscene films simply because their exhibition is limited to consenting adults. *Paris Adult Theatre v. Slaton*, supra.

[7-9] So, although the regulation of obscene expression is unquestionably a legitimate matter for state control, it does not necessarily follow that the doctrine of public nuisance can be constitutionally applied to obscenity. Traditionally, continu-

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ing activity contrary to public morals or decency have constituted public nuisances. *Price v. State*, 96 Ala. 1, 11 So. 128 (1891); *Ridge v. State*, 206 Ala. 349, 89 So. 742 (1921); *Hayden v. Tucker*, 37 Mo. 214 (1866); *Federal Amusement Co. v. State, ex rel. Tuppen*, 159 Fla. 495, 32 So. 2d 1 (1947); *Abbott v. State*, 163 Tenn. 384, 43 S.W.2d 211 (1931); Perkins on Criminal Law, p. 395 (Foundation Press, 1969); Wood, Law of Nuisances, § 68, p. 87, vol. 1 (3d ed., 1893); 66 C.J.S. Nuisance § 18 d, p. 766. Under the police power, a court of equity with proper legislative authorization can assume jurisdiction to abate a nuisance notwithstanding the fact that the maintenance of that nuisance may also be a violation of the criminal law. *Ridge v. State*, supra; *Evans Theatre Corporation v. Slaton*, 227 Ga. 377, 180 S.E.2d 712 (1971), cert. denied 404 U.S. 950, 92 S.Ct. 281, 30 L.Ed.2d 267 (1971).

However, where First Amendment rights are involved, there was been no such unanimity of authority for a multitude of reasons, the more salient of which warrant separate consideration.

[10] At the outset we note three requirements imposed by the First Amendment upon *any* statute which attempts to regulate obscene material: (1) the burden of proving obscenity must always rest with the State; (2) administrative action determining matter to be obscene must not have an air of finality—there must be provision for prompt judicial review; (3) where prior restraint exists, there must be an immediate final determination on the issue of obscenity. *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971); *United Artists Corporation v. Wright*, 368 F. Supp. 1034 (N.D.Ala.1974); *Gulf States Theatres of Louisiana v. Richardson*, 287 So.2d 480 (La.Sup.Ct.1974); *New Riviera Arts Theatre v. State*, 412 S.W.2d 890 (Tenn.Sup.Ct.1967).

[11] In terms of burden of proof, traditional public nuisance doctrine vis-a-vis obscenity poses a twofold dilemma; (1) what is the burden of proof, and (2) upon whom does the burden fall. Regarding the former, there is a dichotomy in the social ills against which obscenity law and public nuisance law are directed. The definitional test for obscenity attempts to separate those materials protected by the guaranties of freedom of expression; the aim of a nuisance action, on the other hand, is not the suppression of a particular form of expression, rather the abatement of a condition which works harm upon a substantial number of the public or which injuriously affects public safety, health, or morals. *City of Selma v. Jones*, 202 Ala. 82, 79 So. 476 (1918).

In *Grove Press, Inc. v. City of Philadelphia*, 418 F.2d 82 (3d Cir. 1969) it was held that nuisance doctrine was too elastic and amorphous to constitutionally restrict First Amendment rights. The court concluded that public nuisance doctrine could not be used both to define the standards of protected speech and to serve as a vehicle for its restraint. Accord, *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957); *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968).

Tit. 7, § 1091, Code, supra, defines as a nuisance any place where ". . . *lewdness*, assignation, or prostitution is conducted, permitted, continued, or exists; . . ." (Emphasis ours). By contrast, this language is discernibly "amorphous" when compared with Tit. 14, § 374(16j) (1971 Supp.) which defines obscenity and related terms with specificity and incorporates the three-prong test for "hard-core pornography" of *Roth v. United States*, supra. The final decree of the trial court, however, demonstrates that in finding the films "obscene", the trial judge used the Roth Standard incorporated in the above statute.

[12] Since the final decree in this cause, the U. S. Supreme Court decided *Miller*, supra. We consider under the

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cts of this case that the *Roth* test embodd in our statute was more stringent than e subsequent *Miller* doctrine. Therefore, ppellant can hardly complain that the *iller* standards have worked to its detrient. Moreover, we are here dealing with civil remedial statute with ample due rocess safeguards and since we are in the vil realm we need not be quite so conious of the strictures attendant in crimial prosecution. We believe that the reaning in *Pierce v. State*, 292 Ala. 473, 296 o.2d 218 (1974), applies with equal force ere; specifically, that definitional infirmies in the Alabama Red Light Abatement ct were cured by judicial construction. ccord, *State ex rel. Ewing v. "Without a itch"*, 37 Ohio St.2d 95, 307 N.E.2d 911 1974); *Gordon v. Christenson*, 317 F. upp. 146 (D.Utah 1970); *Grove Press nc. v. Evans*, 306 F.Supp. 1084 (E.D.Va. 969).

Appellant argues in the alternative hat notwithstanding curative judicial conruction, the legislature did not intend the labama Red Light Abatement Act to be pplicable. There is a substantial amount f persuasive authority for this proposition rom judicial interpretation in sister states f their respective Red Light Abatement cts strikingly comparable to our own. In *eople v. Goldman*, 7 Ill.App.3d 253, 287 .E.2d 177 (1972), it was held that, as sed in its statute, "lewdness" was a synnym for prostitution and therefore the ct did not apply to the activity there ought to be enjoined (a "pornoshop"). imilarly, in *Gulf States Theatres of Louiiana v. Richardson*, supra, the Louisiana upreme Court reasoned that its public uisance statute passed in 1918, only one ear prior to our own, was originally deigned to control prostitution and gambling nd therefore could not be used in the irst Amendment area. The court also mphasized the fact that the statute conained virtually no standards for making udicial determinations of obscenity. Accord, *Southland Theatre, Inc. v. State ex el. Tucker*, 495 S.W.2d 148 (Ark.Sup.Ct. 1973); *Harmer v. Tonlyn Productions, Inc.*, 23 Cal.App.3d 941, 100 Cal.Rptr. 576 (1972).

[13, 14] However, from the broad language of Tit. 7, § 1091, Code, supra, there is no indication of any legislative intent to either include or exclude its application to obscene material. Controlling here is the fact that the Alabama Red Light Abatement Act has been construed as being merely declaratory of the common law, *Duncan v. City of Tuscaloosa*, 257 Ala. 574, 60 So.2d 438 (1952), and, as previously noted, acts at common law contrary to public morals were considered as public nuisances and subject to abatement as such.

[15] The second aspect regarding burden of proof—which party upon whom the burden falls—is resolved in favor of the State. The Alabama Red Light Abatement Act contains none of the burden shifting evils present in *Near v. State of Minnesota*, supra, or *Freedman v. State of Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). The transcript clearly shows that the prosecution was called upon and did in fact meet its burden of proof. Neither the Alabama Red Light Abatement Act nor the Alabama Law on Obscenity authorizes any pre-exhibition licensing or permit procedure. The transcript reveals that appellant was not restrained from exhibiting the allegedly obscene films until after a final adversary proceeding on the issue.

[16] The next requirement—prompt judicial review of any administrative or executive suppression—is also due to be resolved in favor of the State. As noted, the Act does not allow nor was there in fact any suppression of appellant's activities until after final adjudication on the issue of obscenity. Although the Act does make provision for issuance of a temporary injunction after the filing of the original complaint, Tit. 7, § 1095, Code, supra, a hearing thereon must be had within ten

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days, *ibid.* The provision for an ex parte restraining order, Tit. 7, § 1096, is expressly limited to "the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist . . . ." and imposes no restraint upon continuing exhibitions of films until trial on the merits.

Although not at issue here, the application of Tit. 7, § 1101, providing for the closing of the premises pending final determination, presents a more troublesome problem which could constitute a pre-adjudicatory suppression of exhibition.

In *Teitel Film Corporation v. Cusack*, 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968), the United States Supreme Court struck down for want of prompt judicial review a city licensing ordinance which provided a 50 to 57 day administrative process before judicial review could be had. The *Teitel* decision, however, dealt with situations where administrative procedures in effect stayed the hand of the judiciary thereby preventing its prompt intervention, supervision, and final determination on the issue of obscenity. See also *Jodbar Cinema, Ltd. v. Sedita*, 309 F.Supp. 868 (W.D.N.Y.1970); *Freedman v. State of Maryland*, supra.

[17] Under the Alabama Red Light Abatement Act, however, pre-adjudicatory restraint in the form of a temporary injunction is saved by other mandatory provisions in the Act which insure a speedy final resolution of the ultimate issue of obscenity. Tit. 7, § 1095, requires a hearing on that issue within ten days of the issuance of the temporary injunction; Tit. 7, § 1101, requires that the defendant must be given at least five days notice prior to the hearing on the matter of whether such an injunction will be granted; and Tit. 7, § 1103, requires that final adjudication shall take "precedence over all other cases except injunctions." Furthermore, the United States Supreme Court has held that the right to a speedy determination arises only where one has been ex parte deprived of a right. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Blount v. Rizzi*, supra. See also *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La. App.1972).

[18–20] Turning to the last procedural requirement—constitutional prohibition against prior restraint of allegedly obscene expression without immediate judicial determination, any system for the regulation of obscene expression involving prior restraints comes to the court bearing a heavy presumption against its validity. *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963). The decree of the trial court included an order closing the Fox Theatre for *any* purpose for one year. This is not a liquor nuisance nor a prostitution nuisance; rather, a movie house charged with showing certain obscene motion pictures. Evidence of obscene conduct in the past does not justify enjoining future conduct which is protected by the First Amendment. *People ex rel. Hicks v. Sarong Gals*, 27 Cal.App.3d 46, 103 Cal.Rptr. 414 (1972). The padlocking of appellant's operation for one year constitutes prior restraint at its worst and is patently unconstitutional.

While the facts in the recent United States Supreme Court decision of *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), are not directly in point, the reasoning therein is particularly appropriate. We quote:

". . . The presumption against prior restraint is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always

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difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable. See *Speiser v. Randall*, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958)."

We are not the first jurisdiction to hold unconstitutional as prior restraint of First Amendment guaranties the prospective abatement of movie houses as public nuisances. *Society to Oppose Pornography v. Thevis*, supra; *State of Indiana ex rel. Lee v. Mohney Enterprises et al.*, Ind., 289 N.E.2d 519 (1972); *Gulf States Theatres of Louisiana, Inc. v. Richardson*, supra. The Alabama Law on Obscenity, Tit. 14, § 374(1) et seq., provides criminal penalties for conduct such as appellant's—if retributive punishment is sought, those sanctions, not abatement, are the only proper ones authorized by the legislature.

[21] The provision in the Alabama Red Light Abatement Act, Tit. 7, § 1104, supra, allowing for the release on bond is not curative of this constitutional defect. See *Society to Oppose Pornography v. Thevis*, supra. This remedy is available only if the court is satisfied that the owner had no knowledge of the existence of the nuisance.

[22, 23] We are of the opinion there was ample evidence for the trial judge to conclude that the motion pictures in question are obscene. But we also hold that even if one is guilty of maintaining an obscenity nuisance, it is not constitutionally permissible to deprive him prospectively of his First Amendment rights.

Lest there be any confusion as to the extent of our holding that the Alabama Red Light Abatement Act cannot constitutionally be employed to enjoin prospectively the showing of films in enclosed movie theatres to an adult audience, we hasten to delimit this opinion to at least two First Amendment situations in which that statute so applied *might* pass constitutional muster.

The first would be where the impact of the injunction is absolutely devoid of prior restraint or chilling effect upon prospective exercises of expression other than that adjudicated as obscene. More specifically, where there has been a prompt adversary proceeding in which all the requisite constitutional standards for ascertaining the issue of obscenity have been met and the particular film has been found to be obscene; future exhibition of that *particular* film may well constitute a public nuisance and be permanently enjoined as such. See, *Evans Theatre Corporation v. Slaton*, supra; *Cactus Corporation v. State ex rel. Murphy*, 14 Ariz.App. 38, 480 P.2d 375 (1971); *State ex rel. Keating v. Vixen*, 27 Ohio St.2d 278, 272 N.E.2d 137 (1971); contra, *Harmes v. Tonlyn Productions, Inc.*, supra.

The second involves situations where there is a foisting off of patently obscene films, not fit for children to see, in places within their view to include public streets and facilities, residential properties, and private houses. Such activity may also constitute a public nuisance subject to equitable injunction where, of course, attendant constitutional substantive and procedural safeguards are present. See *Bloss v. Paris Township*, 380 Mich. 466, 157 N.W.2d 260 (1968) (drive-in theatres exhibiting films not fit for minors in plain view of public streets and surrounding residences subject to abatement as a public nuisance). But see the recent case of *Erznoznik v. City of Jacksonville*, — U.S. —, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975).

[24, 25] The foregoing possible exceptions should not be construed by prosecuting authorities as a green light for prospective control of particular obscene films or drive-in theatres which broadcast such films. We again point up the imprecise nature of public nuisance doctrine which is ill-equipped to cope with the intricacies of First Amendment guaranties. The law of nuisance cannot become a vehicle for the protection of the sensibilities of the overly

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fastidious; nor can the doctrine of nuisance serve as a means of circumventing these First Amendment safeguards. The requirements of the First Amendment are stringent and demanding—any regulatory scheme which impinges upon these most precious rights will be assured of close scrutiny.

The judgment in this cause is due to be and hereby is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MERRILL, FAULKNER and EMBRY, JJ., concur.

JONES, J., concurs in the result.

MADDOX, J., concurs specially.

HEFLIN, C. J., with whom BLOODWORTH and SHORES, JJ., join, concurs in the result, with opinion.

MADDOX, Justice (concurring specially).

I agree that the injunction issued here which prohibits the showing of *any* film for one year is overbroad, but I cannot agree that the trial judge is powerless to act.

The Fox Cinema Theatre had been used consistently to show films which depicted:

"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

"(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419.

Chief Justice Burger, writing for a majority of the court, in *Miller*, said that the states could regulate illegal conduct such as occurred in this case. One of the regulatory schemes which the Supreme Court, in *Miller*, said was permissible, includes: "applicable state law, as written *or authoritatively construed.*" *Miller* gave this Court the *power* to set the guidelines for regulation of works which depict or describe sexual conduct. It is my opinion, therefore, that a trial judge, using *Miller* standards, could enjoin the operation of a place as a public nuisance if the place had been used for the purpose of showing films which were obscene, under the *Miller* test. In view of the authority granted to this court under *Miller*, I do not think that this Court is so judicially weak, or should be so timid, that it cannot, or will not, "authoritatively construe" our redlight abatement law in such a manner that trial courts could regulate conduct which *Miller* specifically authorizes states to regulate.

Mr. Chief Justice Burger recognized in *Miller* that courts would not have an easy road, free from difficulty. He said:

"* * * But no amount of 'fatigue' should lead us to adopt a convenient 'institutional' rationale—an absolutist, 'anything goes' view of the First Amendment—because it will lighten our burdens. 'Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees.' *Jacobellis v. Ohio*, supra, 378 U.S. at 187–188, 84 S.Ct. [1676] at 1678 [12 L.Ed.2d 793] (opinion of Brennan, J.). Nor should we remedy 'tension between state and federal courts' by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth v. United States*, supra, 354 U.S. at 482–485, 77 S.Ct. [1304], at 1307–1309 [1 L.Ed.2d 1498]. 'Our duty admits of no "substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case." [Citations omitted.]'"

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This Court is the highest court of this state. It is the highest court which can "authoritatively construe" our state laws. I think an examination of the *Miller* opinion clearly indicates that the Supreme Court of the United States intended state courts to construe their state statutes so as to incorporate the specifically prohibited conduct given as examples in the *Miller* case. I think that it is important that we keep in mind that the prohibited acts need not be specifically *written* in any applicable state law, but rather, a judicial construction may be obtained to authoritatively construe any statute so as to incorporate specifically prohibited acts.

It seems clear to me that state courts have the authority to authoritatively construe state statutes and that this is made imminently clear by an analysis of the *Miller* opinion. *Miller* was "vacated and remanded for further proceedings" rather than being outright reversed. I believe that if the Supreme Court was of the opinion that the California statute under consideration in *Miller* could not be authoritatively construed so as to incorporate the new guidelines, the *Miller* case would have been reversed outright rather than being remanded for further proceedings.

The key to the Supreme Court's reasoning in this regard seems to be contained in footnote 7 of the case of *United States v. 12 200-Ft. Reels*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973), handed down the same day as *Miller*. Footnote 7 in *United States v. 12 200-Ft. Reels*, reads as follows:

"We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where '"a serious doubt of constitutionality is raised"' and '"a construction of the statute is fairly possible by which the question may be avoided."' *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L.Ed.2d 822 (1971) (opinion of White, J.), quoting from *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932). If and when such a 'serious doubt' is raised as to the vagueness of the words 'obscene,' 'lewd,' 'lascivious,' 'filthy,' 'indecent,' or 'immoral' as used to describe regulated material in 19 U.S.C. § 1305(a) [19 U.S.C.S. § 1305(a)] and 18 U.S.C. § 1462 [18 U.S.C.S. § 1462], see *United States v. Orito*, supra, 413 U.S. at 140 n. 1, 93 S.Ct. [2674] at 2676 n. 1, [37 L.Ed.2d at 516] we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific 'hardcore' sexual conduct given as examples in *Miller v. California*, supra, 413 U.S. at 25, 93 S.Ct. [2607] at 2615 [37 L.Ed.2d at 431]. See *United States v. Thirty-Seven Photographs*, supra, 402 U.S. at 369–374, 91 S.Ct. [1400], at 1404–1407 [28 L.Ed.2d 822] (opinion of White, J.). Of course, Congress could always define other specific 'hardcore' conduct."

It is significant that in the concluded portions of every opinion handed down concomitantly with *Miller*, the Supreme Court cites to footnote 7 of *12 200-Ft. Reels* wherein the court construed the *federal* obscenity statutes as incorporating the specific representations and description of hard-core sexual conduct "given as examples in *Miller v. California, supra.*"

The reason why the state court cases were remanded for further proceedings is also disclosed in footnote 7 of *12 200-Ft. Reels*. The court noted that while it had the power to authoritatively construe *federal statutes*, it did not possess the authority with reference to *state statutes*.

This is the reason why whenever any state court judgment (such as *Miller*) was vacated and remanded for further proceedings, the Supreme Court specifically referred the state court to footnote 7 of *United States v. 12 200-Ft. Reels*. I construe these judgments of the Supreme Court of the United States as actually in-

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viting the state courts to authoritatively construe their own state statutes just as the federal statutes were construed by the Supreme Court itself in *12 200-Ft. Reels.*

It seemed clear to me that states are free to proceed with obscenity prosecutions under the new *Miller* standards, so long as the state courts construe and apply state obscenity statutes in a manner consistent with the new *Miller* guidelines.

The only constitutional problem I see in this case is the prior restraint inherent in the injunctive relief granted, but I believe relief could be tailored which would regulate illegal conduct, protect First Amendment rights, and would permit the operation of the business to show films which were not obscene. In short, the trial judge had voluminous evidence before him that the Fox Cinema Theatre was being used for an illegal activity. Faced with this overwhelming evidence of a pattern and practice of illegal conduct, and having determined the obscenity vel non of the films which were shown there, the trial court could have enjoined the further use of the theatre to show films which were (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Under *Miller*, I believe the trial judge, under authority of Alabama's Red Light Abatement Act could permanently enjoin the use of the theatre for showing *obscene* films and could require anyone desiring to use the theatre for a legitimate purpose to submit a plan which would show the purpose for which the theatre would be used and the trial court could determine promptly whether the proposed use was for a legitimate purpose, using the *Miller* standard, of course.

A California court, using a Red Light Abatement Act, permanently enjoined a tavern, its owner and operator and any other person from maintaining, using or occupying the premises for the purpose of "lewdness," closed the premises to *all* uses for one year except uses not involving entertainment, and ordered the sheriff to remove all fixtures, equipment and musical instruments from the tavern and to close the building for one year. *People ex rel. Hicks v. "Sarong Gals,"* 42 Cal.App.3d 556, 117 Cal.Rptr. 24 (1974).

The common law of public nuisance may be a valid method by which to implement the state's police power in cases such as this one. In *Grove Press Inc. v. City of Philadelphia*, 418 F.2d 82 (3 Cir., 1969), the court held that the court procedures chosen by the city there were improper, but the court spelled out how the city could regulate the showing of obscene films. It said:

"The mischief we perceive in the Pennsylvania equity rules is that there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter. The preliminary restraint could exist days, and even months, before the judicial decision on the merits; where this possibility exists, an unacceptable threat to the freedom of expression without due process of law results. Failure to provide the necessary expeditiousness tinges the Pennsylvania preliminary injunctive procedures with unconstitutional hues when they are employed to restrain or inhibit expression prior to a final adjudication of an alleged obscene matter.

"We do not challenge, we reiterate, the postulate that 'the primary requirements of decency may be enforced against obscene publications.' *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). This means that relief may be sought in both the civil and criminal branches of the Pennsylvania court system to enforce state laws on obscenity, consonant with the Due Process Clause of the Fourteenth Amendment and the guar-

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antee of First Amendment expression. It is only when the right of the state to regulate obscenity collides with undue inhibition of protected expression that a problem of constitutional dimension arises. Where expression is inhibited as a result of prompt judicial decision reached after an adversary proceeding; there can be no procedural due process complaint. But where the inhibition occurs in a preliminary proceeding, with no guarantee of a prompt judicial decision on the merits, the procedure is constitutionally defective because a restraint of presumably protected expression not only occurs but is capable of persisting for an unlimited time prior to the required judicial determination.

"Our conclusion is not novel in Pennsylvania jurisprudence. The same basic determination has already been alluded to by Mr. Justice O'Brien, speaking for an evenly divided state Supreme Court in *Commonwealth v. Guild Theatre, Inc.*, 432 Pa. 378, 248 A.2d 45 (1968), where the validity of employing the Pennsylvania equity rules to enjoin obscene exhibitions was also raised. There, the state authorities had secured an ex parte injunction without affording the exhibitors any opportunity to be heard. In ruling such procedures constitutionally defective, Mr. Justice O'Brien observed:

"'However, even if a proper hearing had been held, the instant proceeding was fatally defective in another respect. * * * Although we cannot agree with appellants' contention that no prior restraint on the exhibition of a motion picture is permissible, it is clear that any such restraint must be carefully circumscribed. In *Freedman v. State of Maryland*, 380 U.S. 51, 58, 85 S.Ct. 734, 739, 13 L.Ed.2d 649 (1965) the Supreme Court discussed the "procedural safeguards designed to obviate the dangers of a censorship system." One of these safeguards was a prompt, final judicial decision. * * * The fact that appellants may have been offered a full dress *hearing* within four days of the original restraint does not suffice. Quite clearly, there is no provision for a prompt *decision*. It is vital that the continuance of First Amendment freedoms not be dependent upon the efficiency of a particular judge but upon procedural safeguards clearly embodied in a statute. We can only suggest, as did the Court in *Freedman*, supra, that a model for such a statute which can safeguard both the First Amendment freedoms of exhibitors and publishers, and the freedom from obscenity of society as a whole can be found in *Kinglsey (sic) Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). The New York statute there provided for a trial within one day after joinder of issue and a decision within two days of the conclusion of the trial. The instant procedure falls far short of that required.' 248 A.2d at 47–48."

The procedure I suggest, which would require the owner or operator to submit a plan setting out the future course of operation, would constitute some "prior restraint" and "chilling effect," if a prompt decision is made. I believe the test mentioned in *Grove Press* is met. While the protection against prior restraint is an important right, it is not an absolute one. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1947).

Chief Justice Burger commented, in *Miller*, on the spectre of repression which the dissenting Justices feared. He wrote:

"The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free spech and free press . . . .' *Breard v. Alexandria*, 341 U.S. at 645, 71 S.Ct. [920], at 934 [95 L.Ed. 1233, 35 ALR2d 335]. The First Amendment protects works which, taken as a whole,

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have serious literary, artistic, political, or scientific value, regardless of whether the government of a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people,' *Roth v. United States*, supra, 354 U.S. at 484, 77 S.Ct. [1304], at 1308 [1 L.Ed.2d 1498] (emphasis added). See *Kois v. Wisconsin*, 408 U.S. at 230–232, 92 S.Ct. [2245], at 2246–2247 [33 L.Ed.2d 312]; *Thornhill v. Alabama*, 310 U.S. at 101–102, 60 S. Ct. [736], at 743–744 [84 L.Ed. 1093]. But the public portrayal of hardcore sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.

"There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see *Roth v. United States*, supra, 354 U.S. at 482–485, 77 S.Ct. [1304], at 1307–1309 [1 L.Ed.2d 1498], in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an 'extraordinarily vigorous period,' not just in economics and politics, but in belles lettres and in 'the outlying fields of social and political philosophies.'

"We do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of commercial exploitation of human interest in sex."

Consequently, I believe that the trial judge, although following state law, went too far in restraining the use of the theatre for legitimate purposes. This I do not think he could do, but I think he could ensure that if it was used, it would be for legitimate purposes, and not as it had been.

HEFLIN, Chief Justice (concurring in the result):

I concur in the result of the majority opinion in this cause but disagree with the language which attempts to cure the so-called definitional infirmities in the Alabama Red Light Abatement Act by judicial construction.

The majority opinion attempts to make the reasoning in *Pierce v. State*, 292 Ala. 473, 296 So.2d 218 (1974), applicable to the Alabama Red Light Abatement Act. In *Pierce*, this court engrafted by judicial construction the requirements of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) to the 1961 Alabama Obscenity Statute to make it constitutional.

While *Miller v. California*, supra, substituted a less stringent prosecutorial requirement than the one developed from *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 974, 16 L.Ed.2d 1 (1966), in regard to literary, artistic, political or scientific values, it also addressed the issue of limiting specificity necessary for criminal obscenity statutes to withstand constitutional attacks on vagueness and overbreadth grounds.

The majority opinion states that the definitional infirmities in the Alabama Red Light Abatement Act are cured by judicial construction. However, I cannot find in the majority opinion any language by which the requirements of *Miller* are added to the statute in question. I assume that the intent of the majority opinion is to engraft *Miller's* requirements of limiting specificity to the Alabama Red Light Abatement Act. Even if such language did appear in the majority opinion to accomplish such intent, I would, nevertheless maintain that the court does not have the right to judicially engraft these requirements of limiting specificity to the Alabama Red Light Abatement Act.

The following appears in *Miller*:

"This much has been categorically settled by the Court, that obscene material

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is unprotected by the First Amendment. *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972); *United States v. Reidel*, 402 U.S., at 354, 91 S. Ct. [1410], at 1411–1412; *Roth v. United States*, supra, 354 U.S. at 485, 77 S.Ct. [1304], at 1309 'The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]'. *Breard v. Alexandria*, 341 U.S. at 642, 71 S.Ct. [920], at 932, and cases cited. See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–50, 81 S.Ct. 391, 393–395, 5 L.Ed.2d 403 (1961); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S., at 502, 72 S.Ct. [777], at 780. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. *State statutes designed to regulate obscene materials must be carefully limited.* See *Interstate Circuit, Inc. v. Dallas*, supra, 390 U.S. at 682–685, 88 S.Ct. [1298], at 1302–1305. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. • • • A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

"The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin*, supra, 408 U.S. at 230, 92 S.Ct. at 2245, quoting *Roth v. United States*, supra, 354 U.S. at 489, 77 S.Ct. [1304] at 1311; (b) *whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law*; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the 'utterly without redeeming social value' test of *Memoirs v. Massachusetts*, 383 U.S. at 419, 86 S.Ct. [975], at 977 [16 L.Ed.2d 1]; that concept has never commanded the adherence of more than three Justices at one time. • • • See supra, at 2613. *If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.* See *Kois v. Wisconsin*, supra, 408 U.S. at 232, 92 S.Ct. [2245], at 2247; *Memoirs v. Massachusetts*, supra, 383 U.S. at 459–460, 86 S.Ct. [975], at 998 (Harlan, J., dissenting); *Jacobellis v. Ohio*, 378 U.S., at 204, 84 S.Ct. [1676], at 1686 (Harlan, J., dissenting); *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); *Roth v. United States*, supra, 354 U.S. at 497–498, 77 S. Ct. [1304], at 1315–1316 (Harlan, J., concurring and dissenting).

"We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

> "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." (Emphasis supplied)

One of the requirements in *Miller* was that the statutes designed to regulate obscene matters can not be overly broad but must be carefully limited by legislative act

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or judicial construction. The following language in *Pierce* reflects this court's treatment of this requirement:

"In *Miller*, the court attempted to provide 'positive guidance' to other courts dealing with obscenity issues. *The court recognized 'the inherent dangers of undertaking to regulate any form of expression.' Therefore, the court continued, '[s]tate statutes designed to regulate obscene materials must be carefully limited.' The first limitation mentioned by the court was the scope of the statute: '[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct.' Furthermore, '[t]hat conduct must be specifically defined by the applicable state law,* as written or [as] authoritatively construed.' Other guidelines are succinctly stated in the following language:

* * * * * *

"The first issue this court must deal with is whether the statute [the Alabama 1961 Obscenity Statute] contains the necessary specificity as required by *Miller. The U. S. Supreme Court in Miller invites judicial construction as a method of supplying the required specificity if such is absent from the statute.* * * * [T]his court now specifically incorporates the *Miller* guidelines or tests heretofore set out into its construction of the word 'obscene' in Section 374(3). Thus the operation of the provisions of Section 374(4) applicable in this case is limited to matter which depicts or describes sexual conduct. The regulated matter is more specifically restricted to (a) 'Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated,' or (b) 'Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.'." (Emphasis supplied)

From *Miller* it was concluded that in the absence of legislative language supplying the necessary limiting specificity, some state statutes could be judicially construed by engrafting to the statute the necessary limiting specificity and thereby pass constitutional muster. In fact, *Miller* seems to invite judicial construction as a method of supplying the required limiting specificity if such language is absent from the statute. While normally the task of providing limiting specificity to a statute is a legislative function, nevertheless, this court engrafted such limiting specificity to the 1961 Obscenity Statute because of the U. S. Supreme Court's invitation to do so.

Now the majority opinion goes beyond statutes designated to control obscenity and attempts to make the Alabama Red Light Abatement Act a weapon against "hard-core pornography." Obviously, the legislature felt that this act was not an obscenity control statute. This act was passed in 1919 and was on the books when the 1961 Obscenity Act was passed. The 1961 Obscenity Act possesses all of the injunctive relief features which the majority opinion would give to this act. See Title 14, §§ 374(5)-(11), Code of Alabama, 1940, as amended (1958 Recompiled—1973 Cumulative Supp.). Further, there is no invitation from the Supreme Court of the United States for judicial construction to supply the necessary limiting specificity to this statute. I interpret *Miller* as limiting judicial construction engraftments to statutes designed to specifically control obscenity. The act in question is indeed broad and comprehensive in its scope—much more so than the 1961 Obscenity Statute. In my opinion the majority opinion goes beyond the pale of permissible judicial construction and crosses over into the realm of exclusive legislative drafting by attempting to apply the same reasoning as was applied in *Pierce*.

Another reason why I cannot concur in the treatment given by the majority opinion involves a consideration of the residual effects that will inure to the Alabama Red Light Abatement Act following such judicial engraftments. Before such engraftments the act in question was a broad, comprehensive act, useful to the State in fighting battles against prostitution, assig-

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nation and lewdness. If the majority opinion engrafts the requirements of *Miller* to this act then this act will have to be construed in the future in a much more narrow and restricted sense and can only be used as a weapon against prostitution, assignation and hard-core pornography. The former broad protective scope given to "lewdness" is considerably reduced by the majority opinion.

As was previously pointed out, the 1961 Obscenity Act provides within its arsenal injunctive relief from obscene materials. This act can be used to enjoin the showing of obscene motion picture films. There is no real reason to transform the Alabama Red Light Abatement Act into an injunctive relief procedure to combat hard-core pornographic films because such a procedure has been available since 1961.

For the reasons set forth above, I respectfully disagree with certain specified aspects of the majority opinion but feel that the result reached by the majority is correct.

BLOODWORTH and SHORES, JJ., concur.

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APPENDIX E

Judgment of the Supreme Court of Alabama in General Corporation, a corporation v. State of Alabama ex rel. Eugene Sweeton, Chief of Police, City of Huntsville, Alabama, entered on September 18, 1975.

. . . . . E3 - E4

THURSDAY, SEPTEMBER 18, 1975

STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA
SPECIAL TERM 1975

SC 521

GENERAL CORPORATION, A CORPORATION, ETC.

VS.

STATE OF ALABAMA, ETC.

This cause having been duly argued and submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be reversed and annulled and that this cause be remanded to the Court below for further proceedings therein, not inconsistent with the opinion this day rendered by this Court in this cause.

IT IS FURTHER ORDERED AND ADJUDGED that the State of Alabama, on the relation of Eugene Sweeton, Chief of Police of the City of Huntsville, Alabama, pay the cost of appeal in this court and in the court below, for which costs let execution issue.

I, J.O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument herewith set out as same appears of record in said Court.

Witness my hand this 12 day of Jan. 1976.

/s/ J.O. Sentell
Clerk, Supreme Court of Alabama

APPENDIX F

Amendment I of the Constitution of the United States F-3

Amendment XIV of the Constitution of the United States F-3

Alabama Red Light Abatement Act, Title 7, section 7, section 1091 et seq., Code of Alabama 1940, Recompiled 1958. . . . . F4 - F10

Title 14, section 374(16j), Code of Alabama 1940, Recompiled 1958 . . . F10 - F12

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE 2.

ABATEMENT OF CERTAIN NUISANCES.

Sec.
1091. Definitions.
1092. Maintaining nuisance; definition of.
1093. Injunction of nuisance.
1094. When injunction issued before hearing.
1095. Complaint, filing of; temporary injunction.
1096. Restraining order, inventory of property.
1097. Contempt of court, what constitutes.
1098. Service of complaint, when writ granted.
1099. Answer of respondents.
1100. Final decree, when granted.
1101. Closing of premises, pending final decision.
1102. Release of property on bond.
1103. Trial of action; evidence; judgment.
1104. Abatement of nuisance; sale of property.
1105. Claims for goods and property unsold.
1106. Fees of officers selling property, etc.
1107. Nuisance established in criminal action; proceedings under this article.
1108. Contempt proceedings for violation of closing order.

§ 1091. (9280) **Definitions.**—For the purpose of this article, the terms place, person, nuisance are defined as follows: Place shall include any building, erection, or place or any separate part or portion thereof or the ground itself; person shall include any individual, corporation, association, partnership, trustee, lessee, agent or assignee; nuisance shall mean any place as above defined in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose. (1919, p. 52.)

Cross reference.—See note under § 1103 of this title.

Scope of article.—The nuisance dealt with in this article is the maintenance of a place "in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists." Ex parte King, 263 Ala. 487, 83 So. (2d) 241.

This article is not unconstitutional as violative of Constitution, § 45, requiring the subject of legislative acts to be clearly expressed in the title, nor as containing more than one subject. Ridge v. State, 206 Ala. 349, 89 So. 742.

Nor does it violate the due process clause of the Constitution. Ridge v. State, 206 Ala. 349, 89 So. 742.

The confiscation of property is an exercise of the police power.—The authority conferred by this article upon chancery courts to condemn and confiscate property used for criminal or immoral purposes is an exercise of the police power. Ridge v. State, 206 Ala. 349, 89 So. 742.

The proceeding is quasi-criminal in nature.—The proceeding is not a criminal prosecution, though it may be regarded as quasi-criminal, and it is not within the constitutional provisions regulating procedure and protecting accused in criminal prosecutions. Ridge v. State, 206 Ala. 349, 89 So. 742.

Sufficiency of averment.—Averment of nuisance, defined in statutory terms as place of assignation or prostitution, is sufficient. Brown v. State, 222 Ala. 623, 133 So. 913.

Bill to enjoin a breach of covenant is not demurrable under this or the following sections.—A bill to enjoin the breach of a covenant of a negro not to use his own water front for the bathing or picnicking of negroes generally, reserving use by himself, his family, and guests, was based on the right to enjoin a breach of the covenant as such, and was not demurrable for failure to observe the statutory procedure to abate nuisance under this and the following sections of this article. Moseby v. Roche, 233 Ala. 280, 171 So. 351.

Quoted in Howard v. State, 238 Ala. 185, 190 So. 278.

Cited in Ex parte Hill, 229 Ala. 501, 158 So. 531.

Am. Jur. and ALR references.—17 Am. Jur., Disorderly Houses, § 3 et seq.

Constitutionality of statute conferring on chancery courts power to abate bawdy houses as nuisances. 5 ALR 1474, 22 ALR 542, 75 ALR 1298.

Number of females who reside in house or resort thereto for immoral purposes as affecting disorderly character thereof. 12 ALR 529.

§ 1092. (9281) **Maintaining nuisance; definition of.**—Any person who shall use, occupy, establish, or conduct a nuisance as defined in the preceding section, or aid or abet therein, and the owner, agent or lessee of any interest in any such nuisance, together with the person employed in or in control of any such nuisance by any such owner, agent or lessee, shall for the purpose of this article, be guilty of maintaining a nuisance and shall be enjoined as hereinafter provided. (1919, p. 52.)

§ 1093. (9282) **Injunction of nuisance.**—Whenever a nuisance exists, the attorney-general of the state, or the solicitor, his assistant or deputy, or any prosecuting attorney in the county, or any citizen or citizens, may bring an action in equity in the name of the state of Alabama, upon the relation of such attorney-general, or such other officer or person to abate such nuisance and to perpetually enjoin the person or persons maintaining the same from further maintenance thereof. (1919, p. 52.)

Suit may be brought by solicitor or citizen.—Under this section an injunction to abate a nuisance may be brought by the solicitor, his assistant or any citizen on relation of the state and the authority of the attorney general is unnecessary. Rep. Atty. Gen., 1926-28, p. 269.

And solicitor may sign bill brought by state.—A bill by the state to abate a nuisance, averring that the state by the attorney general was complaining and that the state was party complainant, was not subject to demurrer on ground that state was not a "proper party" because bill was signed by state's solicitor instead of attorney general. Gullatt v. State, 243 Ala. 61, 8 So. (2d) 577.

§ 1094. (9283) **When injunction issued before hearing.**—No injunction or restraining order shall be issued before hearing in any action brought by a citizen or citizens under the provisions of this article, unless such citizen or citizens have made bond in such sum as may be fixed by the judge to whom the application for such injunction or restraining order is made, such bond to be approved by the register of the circuit court of the county in which the proceeding is filed and to be payable and conditioned as provided by section 1043 of this title. (1919, p. 52.)

§ 1095. (9284) **Complaint, filing of; temporary injunction.**—Such action shall be brought in the circuit court of the county in which the property is located. At or before the commencement of the action a verified complaint alleging the facts constituting the nuisance shall be filed in the office of the probate judge of the county, together with a notice of the pendency of the action, containing the name of the court, the names of the parties, the object of the action, and a brief description of the property affected thereby. The probate judge shall be paid the usual fee for recording such lis pendens, who shall immediately record such notice. After the filing of the complaint, application for a temporary injunction may be made to the circuit court or a judge thereof or any judge authorized by the laws of the state to make an order for a preliminary injunction, who shall grant a hearing thereon within ten days thereafter. (1919, p. 52.)

Filing of a verified complaint is mandatory. — Filing of verified complaint for record in probate judge's office "at or before" commencement of suit to abate place of prostitution as nuisance is mandatory. Brown v. State, 222 Ala. 623, 133 So. 913.

Probate judge must record.—In proceedings to abate a nuisance under this article, probate judge must record the verified complaint and the lis pendens notice filed in his office under this section. Rep. Atty. Gen., Jan.-Mar., 1941, p. 221.

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Thus, the failure to aver filing is demurrable.—Failure to aver filing of verified complaint in probate judge's office in bill to abate place of prostitution as nuisance was presented by general demurrer. Brown v. State, 222 Ala. 623, 133 So. 913.

Bill to abate place of prostitution as nuisance need not be verified by one having knowledge of facts. Brown v. State, 222 Ala. 623, 133 So. 913.

Where affiant, the solicitor, deposed "that he is informed and believes and upon such information and belief says that the allegations and averments contained in the foregoing bill of complaint are true," this was the approved form of verification. Brown v. State, 222 Ala. 623, 133 So. 913.

Cited in Stephens v. State, 257 Ala. 375, 59 So. (2d) 69.

§ 1096. (9285) **Restraining order, inventory of property.**—Where such application for a temporary injunction has been made, the court or judge thereof may, on the application of the complainant, issue an ex parte restraining order, restraining the respondents and all other persons from the moving or in any manner interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court or judge granting or refusing such temporary injunction, and until the further order of the court thereon. The restraining order may be served by handing to and leaving a copy of said order with any person in charge of said place or residing therein, or by posting a copy thereof in a conspicuous place at, or upon one or more of the principal doors or entrances to such places, or the judge may order it served on the parties defendant. The officer serving such restraining order shall forthwith make and return into the court, an inventory of the personal property and contents situated in and used in conducting and maintaining such nuisance. (1919, p. 52.)

§ 1097. (9286) **Contempt of court, what constitutes.**—Any violation of such restraining order shall be a contempt of court, and where such order is so posted, mutilation or removal thereof, while the same remains in force, shall be a contempt of court. (1919, p. 52.)

§ 1098. (9287) **Service of complaint, when writ granted.**—A copy of the complaint together with a notice of the time and place of the hearing of the application for a temporary injunction shall be served upon the respondents at least five days before such hearing. If the hearing be then continued at the instance of any respondent, the temporary writ as prayed shall be granted as a matter of course. (1919, p. 52.)

§ 1099. (9288) **Answer of respondents.**—Each respondent so notified shall serve upon the complainant or the attorney filing the bill, a verified answer on or before the date fixed in said notice for said hearing and such answer shall be filed with the register of the court wherein such cause is triable, but the court or judge may allow additional time for answering, providing such extension of time shall not prevent the issuing of said temporary writ as prayed for. (1919, p. 52.)

§ 1100. (9289) **Final decree, when granted.**—If upon the final hearing, the allegations be sustained to the satisfaction of the court or judge, the court or judge shall make a decree restraining the respondents and all other person or persons from continuing the nuisance. When any injunction has been granted, it shall be binding on the respondents throughout the county. Any violation thereof shall be contempt of court and punished as hereinafter provided. (1919, p. 52.)

§ 1101. (9290) **Closing of premises, pending final decision.**—If on the hearing for a temporary injunction, it shall further appear that the

person owning, in control, or in charge of the nuisance so enjoined has received five days' notice of the hearing, and unless such person shall show to the satisfaction of the court or judge that the nuisance complained of has been abated, the court or judge shall issue an order closing the place against its use for any purpose until final decision shall be rendered on the application for a permanent injunction. Such order shall also continue in effect for such further period the restraining order above provided if already issued, or if not issued, shall include such an order restraining, for such period, the removal or interference with the personal property and contents located thereat or therein as hereinbefore provided, and such restraining order shall be served and the inventory of such property shall be made and filed as hereinbefore provided. (1919, p. 52.)

Cross reference.—For release of property on bond, see § 1102 of this title and the note thereto.

This section and section 1102 apply to abatement of nuisances in liquor cases.—This section providing for the closing of premises constituting a nuisance pending the final decision of an application for a permanent injunction, and § 1102 of this article providing for a release of the property on bond, apply to cases of abatement of liquor nuisances, but contemplate resort to a closing order only after notice and hearing. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

The provisions as to padlock proceedings contained in this and the following sections of this title are applicable to padlock proceedings under Title 29, section 141. Rep. Atty. Gen., Quar. Rep. April-June 1939, p. 149.

In proceedings for the abatement of a liquor nuisance, the preliminary injunction was improper in so far as it related to the matter of padlocking defendant's premises without notice or hearing, and denying defendant's right to reopen the premises for lawful purposes on the execution of a bond. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

§ 1102. (9291) Release of property on bond.—The owner or owners of any real property or personal property so closed or restrained, or to be closed or restrained, may appear at any time between the filing of the complaint and the hearing of the application for a permanent injunction and, upon payment of all costs incurred, and upon the filing of a bond payable to the state by the owner of the real property, with sureties, or a surety company, to be approved by the register, in the full value of the property to be ascertained by the court, or the judge, conditioned that such owner or owners will immediately abate the nuisance and prevent the same from being established or kept until the decision of the court or judge shall have been rendered on the application for a permanent injunction, then, in that case, the court or judge, if satisfied of the good faith of the owner of the real property and of innocence on the part of any owner of the personal property of any knowledge of the use of such personal property as a nuisance, and that with reasonable care and diligence such owner could not have known thereof, shall deliver such real or personal property, or both, to the respective owners thereof, and cancel or refrain from issuing at the time of the hearing on the application for the injunction as the case may be, any order or orders closing such real property or restraining the removal or interference with such personal property. The release of any personal property or real property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subjected by law. (1919, p. 52.)

This section authorizes a release of the property upon the execution of sufficient bond.—This section provides for the release of the property, upon execution of bonds to secure against its use for unlawful purposes, pending the hearing of the cause, that is to say, in the interim between the filing of the bill of complaint and the chancellor's final decree thereon. Rep. Atty. Gen., Quar. Rep., April-June 1939, p. 150.

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It and section 1101 apply to cases of abatement of liquor nuisances.—Section 1101 of this article, providing for the closing of premises constituting a nuisance pending the final decision of an application for a permanent injunction, and this section apply to cases of abatement of liquor nuisances, but contemplate resort to a closing order only after notice and hearing. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

Property used in the maintenance of a liquor nuisance should be padlocked only if necessary to enforce the law. Garrett v. State, 235 Ala. 457, 179 So. 636.

Padlocking of property, used in the maintenance of a liquor nuisance by one shown to be a persistent violator of the law, is proper, but should be modified on sufficient showing that the property will not be again employed in the conduct of such nuisance. Garrett v. State, 235 Ala. 457, 179 So. 636.

Circuit court in equity could not punish for single violation of liquor nuisance injunction exceeding statutory penalty although court might require bond or padlocked premises to secure observance of injunction. Ex parte Hill, 229 Ala. 501, 158 So. 531.

Jurisdiction retained to enter future orders.—A decree, enjoining the continuance of a liquor nuisance, requiring a bond to abide thereby and padlocking the property on the failure to execute a bond, properly retained jurisdiction to enter proper orders in the future. Garrett v. State, 235 Ala. 457, 179 So. 636.

Certiorari as a proper remedy in padlock proceedings.—Certiorari was the petitioner's proper remedy, where his premises, allegedly constituting a liquor nuisance, were ordered padlocked by a preliminary order for injunction without notice or hearing and where petitioner was not permitted to reopen his premises for lawful purposes on execution of a bond. Ex parte Harvell, 235 Ala. 63, 177 So. 345.

§ 1103. (9292) **Trial of action; evidence; judgment.**—The action when brought shall have precedence over all other cases except injunctions. In such action, evidence of the general reputation of the place or any admission or finding of guilt of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiesence and participation therein, on the part of the person or persons charged with maintaining such nuisance as herein defined. If the complaint is filed for the state by a citizen of the county, it shall not be dismissed except upon a sworn statement of the complainant or his personal representative or agent, and his attorney or of the officer filing the complaint, setting forth the reasons why the action should be dismissed and the dismissal be approved by the attorney filing the bill in writing or in open court. If the court or judge is of the opinion that the action ought not to be dismissed, he may direct the solicitor to prosecute such action to judgment at the expense of the county, and if the action is continued more than once, any person who is a citizen of the county, or the attorney-general or the solicitor may be substituted for the complainant and prosecute said action to judgment. If the action is brought by a person who is a citizen of the county and the court finds that there were no reasonable grounds or cause for said action, the costs may be taxed against such person. If the existence of the nuisance be established upon the trial, a judgment shall be entered which shall perpetually enjoin the respondents and any other person or persons from further maintaining the nuisance at the place complained of and the respondents from maintaining such nuisance elsewhere in the county. (1919, p. 52.)

Scope of power to enjoin.—Power is conferred upon equity courts by this section to enjoin the defendants perpetually, in a proceeding to abate a public nuisance as defined in § 1091 of this title, from further maintaining the particular nuisance at the place complained of or elsewhere in the county. Young v. State, 253 Ala. 312, 45 So. (2d) 29.

§ 1104. (9293) **Abatement of nuisance; sale of property.**—If the existence of the nuisance be admitted or established in an action as provided in this article, or in a criminal proceeding in the circuit court, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the place of all personal property and contents used in conducting the nuisance, and not already released under authority of the court as provided in sections 1095-1102 of this title, and shall direct the sale of such thereof as belonged to the respondents notified or appearing, in the manner provided for the sale of chattels under execution. Such order shall also require the renewal for one year of any bond furnished by the owner of the real property as provided in section 1102 of this title, or if not so furnished, shall continue for one year any closing order issued at the time of granting the temporary injunction, or if no such closing order was then issued, shall include an order directing the effectual closing of the place against its use for any purpose, and so keeping it closed for a period of one year unless sooner released; but the owner of the place so closed and not released under bond as hereinbefore provided may now appear and obtain such release in the manner and upon fulfilling the requirements as hereinbefore provided. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty, or liability to which it may be subject by law. (1919, p. 52.)

Jurisdiction is retained to enter further orders.—Where the charge of maintaining a liquor nuisance is sustained by the evidence and a decree is entered enjoining the continuance of such nuisance, requiring bond conditioned to abide the decree, and padlocking the property on the failure to execute a bond, the court retains jurisdiction to enter proper orders in the future. Garrett v. State, 235 Ala. 457, 179 So. 636.

Property may be released pending appeal from final decree.—By this section the chancellor has authority to make an order authorizing the release of the property pending the appeal from his final decree. Rep. Atty. Gen., Quar. Rep., April-June 1939, p. 149.

§ 1105. (9294) **Claims for goods and property unsold.**—Owners of unsold property and contents so seized must appear and claim same within ten days after such order of abatement is made and prove innocence to the satisfaction of the court, of any knowledge of said use thereof and that with reasonable care and diligence they could not have known thereof. Every defendant in the action shall be presumed to have had knowledge of the general reputation of the place. If such innocence be so established, such unsold personal property and contents shall be delivered to the owner; otherwise, it shall be sold as hereinbefore provided. If any person shall break and enter or use a place so directed to be closed, he shall be punished for contempt as provided hereinafter. (1919, p. 52.)

§ 1106. (9295) **Fees of officers selling property, etc.**—For removing and selling the personal property and contents, the officer shall be entitled to charge and receive the same fees as he would for levying and selling like property on execution; and for closing the place and keeping it closed, a reasonable fee shall be allowed by the court. (1919, p. 52.)

§ 1107. (9296) **Nuisance established in criminal action; proceedings under this article.**—In case the existence of such nuisance is established in a criminal proceeding in a court not having equitable jurisdiction, the solicitor or prosecuting officer shall proceed promptly under this article to enforce the provisions and penalties thereof, and the finding of the defendant guilty in such criminal proceedings, unless reversed or set aside,

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shall be conclusive as against the defendant as to the existence of the nuisance. The proceeds of the sale of the personal property, as provided in the preceding section, shall be applied in payment of the costs of the action and abatement including the complainant's costs, or so much of such proceeds as may be necessary, except as hereinafter provided. (1919, p. 52.)

§ 1108. (9297) **Contempt proceedings for violation of closing order.**—In case of the violation of any injunction or closing order granted under the provisions of this article, or of any restraining order or the commission of any contempt of court in proceedings under this article, the court, or the judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the register of the court a complaint under oath, setting out and alleging facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested; he may be released on bond, pending the hearing, to be fixed by the judge. The trial may be had upon affidavits, or either party may demand the production and oral examination of witnesses. A party found guilty of contempt, under the provisions of this article, shall be punished by a fine of not less than one hundred dollars nor more than two hundred dollars, or by imprisonment in the county jail not less than one nor more than three months, or by both such fine and imprisonment. (1919, p. 52.)

This section is constitutional. Ridge v. State, 206 Ala. 349, 351, 89 So. 742.

This section does not apply to operation of a liquor place in alleged violation of a zoning ordinance, since it applies only when a party is found guilty of contempt in the maintenance of a place "in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists." Ex parte King, 263 Ala. 487, 83 So. (2d) 241.

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CHAPTER 64C.

SALE, EXHIBITION, ETC., OF OBSCENE MATERIALS TO PERSONS OVER EIGHTEEN.

Sec.
374(16j). Definitions.
374(16k). Sale, etc., of certain materials unlawful.
374(16l). Exhibition, etc., of certain shows or presentations unlawful.
374(16m). Notice required before commencement of prosecution; action for declaratory judgment.
374(16n). Penalties.
374(16o). Chapter cumulative.

§ 374(16j). Definitions.—As used in this chapter.

(a) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(b) "Sexual conduct" means act of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

(c) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(d) "Sado-masochistic abuse" means flagellation or torture by or upon a

person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Obscene" means that description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(i) Predominantly appeals to the prurient, shameful or morbid interest, and (ii) is patently offensive to prevailing or contemporary standards in the adult community as a whole with respect to what is suitable material, and (iii) is utterly without redeeming social value or importance.

(g) "Hard-core pornography" means material, when considered as a whole, its predominant appeal is to prurient interest, is patently offensive to prevailing or contemporary standards, is utterly without redeeming social value or importance and in addition it goes substantially beyond customary limits of candor in describing or representing such matters.

(h) "Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both:

(i) The character and content of any material described herein which is reasonably susceptible of examination by the defendant.

(ii) Such term includes the calculated purveyance of filth.

(i) Mailable matter means (a) printed or written matter or material having second-class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States. (1969, p. 1253, § 1, appvd. Sept. 10, 1969.)

Applied in Grove Press, Inc. v. Bailey, 318 F. Supp. 244 (N.D. Ala. 1970).

§ 374(16k). Sale, etc., of certain materials unlawful.—It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a person eighteen years of age or older:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is obscene or represents hard-core pornography.

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) of section 374(16k) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is obscene or represents hard-core pornography.

(c) Nothing in this section shall be deemed to apply to mailable mattter unless such mailable matter is known by such person to have been judicially found to be obscene or to represent hard-core pornography under this chapter or under the provisions of any other Alabama statutes. (1969, p. 1254, § 2, appvd. Sept. 10, 1969.)

§ 374(16l). Exhibition, etc., of certain shows or presentations unlawful.—It shall be unlawful for any person knowingly to exhibit for a monetary consideration to another or knowingly to sell to another an admission ticket or pass or knowingly to admit another for a monetary con-

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sideration to premises whereon there is exhibited, a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse which is obscene or represents hard-core pornography. (1969, p. 1254, § 3, appvd. Sept. 10, 1969.)

§ 374(16m). Notice required before commencement of prosecution; action for declaratory judgment.—(a) No prosecution may be commenced against any person for violating sections 374(16k) and 374(16l) of this title unless the accused is first served with prior written notice that there is reasonable cause to believe the material upon which such prosecution is based violates this chapter, and the accused has, after receiving such notice violated this chapter.

(b) The written notice provided for in paragraph (a) of this section 374(16m) may be given by only the following officials; the state attorney general and any assistant attorney general; the district attorney, county solicitor, their assistants and deputies, or any person whose office and duty is to prosecute criminal actions before any state, county or municipal court; the sheriff; the chief of police of any municipality or town; and the duly authorized law enforcement employees of the department of public safety.

(c) Any person receiving such written notice provided for in paragraph (a) of this section 374(16m) shall have the right within 30 days from such notice to file an appropriate action for declaratory judgment to determine the validity of such written notice, but no such action shall, by reason of the commencement thereof, stay or in any way delay or postpone any prosecution for the violation of this chapter. (1969, p. 1254, § 4, appvd. Sept. 10, 1969.)

Subsequent showing of film after notice received forms basis of criminal prosecution. — This section purports only to regulate the distribution of material, i.e., motion pictures, as to which there has been a viewing, a determination of obscenity by those empowered to make such a finding, and proper notice given to the distributor in relation thereto. It is thus the subsequent showing of that same film or films after receiving such notice which forms the basis for a criminal prosecution. McKinney v. City of Tuscaloosa, 49 Ala. App. 21, 268 So. 2d 488 (1972).

Where there was no subsequent showing of films which were the subject of the notice given, the police did not follow the procedural safeguards of this section. McKinney v. City of Tuscaloosa, 49 Ala. App. 21, 268 So. 2d 488 (1972).

§ 374(16n). Penalties.—Any person, firm or corporation violating any provision of this chapter shall be guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail or sentenced to hard labor for the county, for not more than one year, and may be fined not more than two thousand dollars ($2,000.00) for each offense, or be both so imprisoned and fined, in the discretion of the court. (1969, p. 1255, § 5, appvd. Sept. 10, 1969.)

§ 374(16o). Chapter cumulative. — The provisions of this chapter are cumulative and shall be in addition to any and all laws now enacted dealing with obscene or hard-core pornography and shall not be construed to limit or repeal other laws on such matters and shall specifically apply to the exposing of obscene and harmful materials to persons eighteen years of age and older. (1969, p. 1255, § 6, appvd. Sept. 10, 1969.)